

**DRM and Consumer Protection in E-commerce Transactions: A Comparative Study of
the EU and the US Legal Framework**

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Abstract

This thesis studies consumer protection in e-commerce transactions against the negative effects of digital rights management ('DRM') technologies and analyzes the main differences, similarities and tendencies of the legal regulation in the EU and the US. Due to the characteristics of the subject, the methodology selected to carry out this research analysis is the functional method of comparative law. The thesis first outlines specific characteristics of digital content and DRM, and the negative effects they may have, *inter alia*, on the consumers' right to access and use digital content, the fair use of a copyrighted material, the interoperability and functionality of digital content, or consumers' privacy. Then it defines provisions applicable to e-commerce consumer transactions with regard to supply of digital content. Subsequently, it focuses on key aspects of consumer protection, namely information obligations, the right of withdrawal and the rules against unfair terms and practices, comparing the solutions provided by EU and US laws. The thesis finds that although relevant provisions in the two selected jurisdictions are different, their effects are functionally similar. The possibility to withdraw from a contract for the supply of digital content (or to cancel the contract) is limited in both cases, which from the point of view of a consumer increases the importance of pre-contractual information disclosure. Courts in both jurisdictions examine procedural and substantive unfairness and although the procedural unfairness in e-commerce consumer transactions is presumed due to prevailing use of non-negotiated terms, the presence of both procedural and substantive unfairness is rarely found.

Introduction

One of the consequences of the rapid technological development and the rise in the number of electronic transactions in general is the easily available access to digital content for consumers. Electronic transactions such as online downloading of software, streaming or downloading of movies, purchasing copies of e-books have become a daily routine of users and consumers worldwide. Yet, many consumers report experiencing problems with digital content services stemming mainly from low quality, access restrictions, privacy and security threats, or unfair practices.¹

From the legal point of view these problems are undoubtedly challenging, because of the very specific characteristics of digital content and contracts involving it. Firstly, digital content is intangible and in the prevailing number of cases it is provided online without an involvement of a tangible carrier or medium. Secondly, it is very often covered by intellectual property rights, which are protected and enforced by their rightholders through technological measures, or digital management rights ('DRM'), that, as will be explained, often interfere with consumer rights. These specific characteristics raise some important questions about the level of consumer protection, considering the fact that the rules designed to be applied on consumer transactions of tangible goods, are not always suitable for digital content.

The aim of this thesis is to analyze the main differences, similarities and tendencies of legal regulation regarding consumer protection against the negative effects of DRM in the EU and the US, and to evaluate their effectiveness. The thesis is based on an underlying assumption that although the EU and the US consumer protection laws are representing two different legal

¹ Europe Economics, 'Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (Lot 1)' (Report 4: Final Report, 15 June 2011) iv-v <http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf> accessed 8 February 2015.

traditions, the effects of the rules aimed at protecting consumers against the negative effects of DRM are functionally similar. Where rules are available, their interpretation and application with regards to digital content is in some cases uncertain.

The following research questions should be answered by this thesis. The main question asks whether the rules providing for consumer protection are an effective measure to reduce some of negative effects of DRM technologies. In order to proceed, several related questions are raised. Firstly, it is important to ask what negative effects on consumers DRM can have. Secondly, it is necessary to verify which rules aimed at consumer protection are applicable to the consumer contracts for provision of digital content concluded online. Thirdly, the paper will analyze what is the legal approach adopted in the EU and the US and in what respects these approaches are similar, and in what they differ.

Although previous research in the field of consumer protection against negative effects of DRM in electronic commerce transactions including the comparative study of EU law and US law has been carried out,² it is rather limited in scope and it mostly does not take into account the changes introduced by the EU Directive 2011/83/EU on Consumer Rights.³ Therefore this thesis will analyze the problem in the context of the important changes that have recently been introduced to EU law.

The topic of negative effects of DRM on consumers is very broad and it can be approached from different legal perspectives. Copyright holders usually use both DRM and extensive contractual terms to protect their rights. Both DRM and contracts can interfere with the copyright law provisions regulating users' rights, such as exceptions and limitations to

² See for example Nicola Lucchi, 'Countering the Unfair Play of DRM Technologies' (2007) 16 Texas Intellectual Property Law Journal 91.

³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64 (Directive on Consumer Rights).

copyright. Therefore one closely related issue is the relationship between copyright law and contracts, and the question whether privileges of the copyright holders can be contractually extended beyond the statutory scope or the exceptions and limitations to the copyright can be contractually restricted. This topic has been treated in great detail in scholarly literature⁴ and despite being very closely interrelated, will be omitted from this paper.

Consumers have several options with regard to possible actions against negative effects of DRM. Much attention has been paid to the question of legitimate circumvention of technological protection measures by users of digital content, anti-circumvention legislation and the exceptions to anti-circumvention legislation.⁵ Although consumers could in specific cases circumvent DRM in order to prevent some of their negative effects, this broad issue has to be omitted from this thesis due to its limited scope. Furthermore, when dealing with DRM, consumers could in some cases invoke constitutional law and competition law when claiming their rights, because DRM can conflict with their fundamental rights or be a distortion to the competition on the market. The point of view of constitutional law and competition law will not be analyzed in the paper either.

It follows that in order to create a full and complex picture of the legal approach to DRM many perspectives, such as those indicated above, should be taken into account. This thesis will, however, focus only on the essential measures available to consumers, such as the information

⁴ See for example: Maureen O'Rourke, 'Preemption after the ProCD Case: A Market-Based Approach' (1997) 12 Berkeley Technology Law Journal 53; JH Reichman and Jonathan A Franklin, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information' (1999) 147 University of Pennsylvania Law Review 875; Lucie Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002); Viva R Moffat, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41 University of California, Davis 45; Christina Bohannon, 'Copyright Preemption of Contracts' (2008) 67 Maryland Law Review 616.

⁵ See for example: Pamela Samuelson, 'Digital Rights Management {and, or, vs.} the Law' (2003) 46 Communications of the ACM 41; Nicola Lucchi, 'Intellectual Property Rights in Digital Media: A Comparative Analysis of Legal Protection Technological Measures, and New Business Models under EU and U.S. Law' (2005) 53 Buffalo Law Review 1111.

obligations, the right of withdrawal and unenforceability of unfair terms and practices, which are the main aspects of the EU consumer law and which will be studied with the comparable aspects in US law.

The EU and the US in general have very different legal traditions, and their rules and legal doctrines usually differ significantly. This is also the case of the consumer protection rules. Despite the fact that the formal rules are remarkably divergent, the two systems often come to similar solutions and have comparable effects. It can be presumed that with regard to digital content both of these legal systems are designed to balance the rights of the consumers on the one side and the rights of the copyright holders on the other side and consequently their effects are akin. For this reason, the functional method of comparative law was chosen as the most appropriate method to be used for the research.

The thesis is divided as follows. After the introduction, the first chapter which is devoted to a definition of digital content and an outline of the DRM, their function and negative effects, including a brief outline of copyright perspective, follows. The next two chapters provide an analysis of the consumer protection regulation with regard to DRM technologies and their negative effects in the EU and the US legal framework respectively. These chapters are the basis of the comparative research and in the chapter that follows them, a comparative analysis of the previously outlined aspects of the EU and the US legal frameworks will be carried out. The conclusion will provide closing remarks on the subject matter of the thesis and its outcomes. It will sum up the findings about the available rules in the two legal systems, their functional similarity and the problems regarding their applicability to e-consumer transactions.

CHAPTER 1 - Digital Content and Digital Rights Management

This thesis narrows down quite a broad topic of consumer protection in electronic commerce and focuses on the negative effects of DRM. DRM use technological protection measures in order to prevent an unauthorized access or use of digital content. The purpose of this chapter is to clarify what is understood as digital content, how DRM can be defined, how they function, and what negative effects on consumers' rights they may have.

1.1 Digital Content

Digital content, digital material, digital products and digital services are all these terms that can be found in scholarly literature. While EU law has a legal definition and recognizes the contracts for the supply of digital content, the definition in US law is rather implied. An analysis of the definition of the term digital content is the first important step in order to determine which rules of the two legal frameworks apply. The two subsections that follow will briefly analyze the definition under EU law and US law respectively and then a comparison of the two approaches will be made.

1.1.1 *Definition of digital content in EU law*

Digital content had not been legally defined under EU law until recently. Various documents and reports used different and rather broad definitions. For example, according to the Europe Economics' report digital content can be defined as 'all digital content which the consumer can access either online or through any other channels, such as a CD or DVD, and any other services which the consumer can receive online.'⁶ Transactions involving digital content are nominated

⁶ Europe Economics (n 1) ii.

as ‘digital content services’ and they include also services such as communication services. Software was also covered by this very broad definition.⁷

Under EU law, a definition of digital content was introduced by the Directive on Consumer Rights, adopted on 25 October 2011.⁸ This Directive defines digital content as ‘data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.’⁹ The Directive further makes a distinction according to the means by which the digital content is supplied: ‘If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods’¹⁰ and consequently, the contract for supply of digital content on a tangible medium will be considered a contract for sale of goods. On the other hand, ‘contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts.’¹¹ This solution corresponds to the legal opinion which makes distinction between digital content itself and a method how it is supplied.¹² According to this view digital content itself cannot be regarded as a ‘tangible item’ and is usually protected by copyright. It can be supplied on a physical medium which is the ‘tangible item’ and therefore it can be ‘sold’. In case it is not supplied on any tangible medium, then the digital content is not ‘sold’, but rather ‘accessed’ or provided as a service.¹³

⁷ Europe Economics (n 1) ii.

⁸ Directive on Consumer Rights (n 3).

⁹ *ibid*, recital 19.

¹⁰ *ibid*.

¹¹ *ibid*.

¹² Hervé Jacquemin, ‘Digital Content and Consumer Protection within European Law’ in Arnab Alapan and Colin Jean-Noel (eds), *The 8th International Workshop for technical, Economic and Legal Aspects of Business Models for Virtual Goods* (Presses universitaires de Namur 2010) 41, 46–47.

¹³ *ibid*.

It follows that the Directive on Consumer Rights together with the introduction of the definition of digital content also distinguished a separate legal category of contracts for online digital content, regarding which the special provisions regulating the right of withdrawal and information requirements, which are relevant for the purposes of this thesis, apply.¹⁴

1.1.2 Definition of digital content in US law

With regard to a definition of digital content under US law, references should be made to the Uniform Commercial Code ('UCC'), the Uniform Computer Information Transactions Act ('UCITA') and the American Law Institute Principles of the Law of Software Contracts ('ALI Principles').¹⁵

Although Article 2 of the UCC applies to goods which are defined as movable things,¹⁶ there is a common tendency to apply it also to digital products including software, which are supplied either with or without a tangible medium.¹⁷ Such an interpretation is also supported by case

¹⁴ An interesting point to be made is that the Directive on Consumer Rights does not require payment in case of the contracts for the supply of digital content, therefore the relevant provisions should therefore also apply to such cases as downloading free content from an online store. European Commission - DG Justice, 'DG Justice Guidance Document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council' (June 2014) 8 <http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf> accessed 8 February 2015.

¹⁵ Given the complexity of the US legal system, which consists of national and federal laws, case law and common law, for the purposes of this thesis references will be made above all to major federal statutes, uniform law and legal principles. Jean Braucher, 'United States' in University of Amsterdam (ed), 'Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services' (Report 1: Country Reports, 2011) 399–400 <http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015.

¹⁶ UCC § 2–105(1) (2002).

¹⁷ BM Marco Loos and others, 'Final Report: Comparative Analysis, Law & Economics Analysis, Assessment and Development of Recommendations for Possible Future Rules on Digital Content Contracts' (University of Amsterdam, 2011) 38 <http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf> accessed 8 February 2015.

law. In *Micro Data Base Systems, Inc v Dharma Systems, Inc*¹⁸ the court held that the UCC can be applied to sales of custom software.

UCITA regulates ‘computer information transactions’¹⁹, ie transactions involving ‘computer information’²⁰, which include computer programs, software and other digital content and multimedia products such as text, sounds and images.²¹ It is important to mention that UCITA has been enacted in two states only, but can be also applied by analogy or choice of law. UCITA makes a distinction between digital products supplied on a tangible carrier such as a disk and digital products ‘delivered’ without any tangible carrier, eg accessed or downloaded online. If a transaction involves goods and computer information, ‘gravamen of the action’ standard applies meaning that the applicable law depends on whether the issue pertains to the goods²² or to the computer information.²³ As an exception to the general rule of gravamen test, UCITA treats the medium that carries the computer information as a part of the computer information, whether the medium is a tangible or an electronic object. Copy, documentation and packaging of the computer information are ‘mere incidents of the transfer of the information’.²⁴

¹⁸ *Micro Data Base Systems, Inc v Dharma Systems, Inc* [1998] 148 F3d 649, 654 as cited by Braucher (n 15) 402.

¹⁹ UCITA § 102(11) (2000).

²⁰ *ibid*, § 102(10).

²¹ *ibid*, § 102(35).

²² Article 2 of the UCC would apply to a contract for the sale of movable and tangible goods.

²³ UCITA § 103 (2010), comment 4(b). ‘Uniform Computer Information Transactions Act Refs & Annos’ (Thomson Reuters 2014, electronic version)

<http://international.westlaw.com/result/default.wl?cfid=1&mt=LawSchoolPractitioner&origin=Search&sri=329%2c330%2c333%2c334&query=%22UNIFORM+COMPUTER+INFORMATION+TRANSACTIONS+ACT%22+%26+%22GRAVAMEN+OF+THE+ACTION+STANDARD%22&db=REST%2cUS-RULES%2cULA%2cUCC-TEXT&rlt=CLID_QRYRLT88241217253&method=TNC&service=Search&eq=Welcome%2fLawSchoolPractitioner&rp=%2fWelcome%2fLawSchoolPractitioner%2fdefault.wl&sp=intceu2-000&srch=TRUE&vr=2.0&action=Search&rltdb=CLID_DB686491117253&sv=Split&fmqv=s&fn=top&utid=25&rs=UKIS1.0> accessed 25 March 2015.

²⁴ *ibid*.

Unlike UCITA, the ALI principles ‘apply to agreements to sell, lease, license, access or otherwise transfer or share software’.²⁵ The ALI Principles do not apply to other digital content such as e-books or music. They also do not apply to transfers of any tangible medium storing the software, unless the software is embedded in goods and ‘a reasonable transferor would believe the transferee’s predominant purpose for engaging in the transfer is to obtain the software.’²⁶

It should be also pointed out how US law classifies the contracts the subject of which is digital content. It was mentioned that in many cases such transactions will be considered as the contracts for sale of goods.²⁷ Besides that, US law also uses the term ‘access contract’²⁸ which includes transactions the purpose of which is an online access to digital content and software.²⁹

1.1.3 Comparison of the EU and the US legal approach

The outlined EU and US legal approaches towards digital content show some similarities. Under EU law, digital content includes software and other digital products, regardless of whether they are supplied on a tangible medium. However, digital content supplied on a tangible medium shall be considered as goods, while digital content not supplied on a tangible medium shall be subject to the special provisions governing the contracts for digital content. Under US law digital content is not expressly defined, but it follows from the applicable rules that a definition would, similarly to EU law, contain software and other digital products. In contrast to EU law, in the US sale of goods law will commonly apply to digital content transactions. In case UCITA is applied, a medium that carries the computer information would

²⁵ ALI Principles § 1.06(a) (2010).

²⁶ *ibid*, § 1.06(b), § 1.07 (2010).

²⁷ Loos and others (n 17) 38.

²⁸ UCITA § 102(1) (2000), ALI Principles § 1.01 (2010).

²⁹ Braucher (n 15) 398.

be, unlike in EU law, considered a part of the computer information rather than goods and in case of goods and computer information involved ‘gravamen of the action’ standard would apply. Finally, the ALI Principles will apply only to software transactions. A case when software is supplied on a tangible medium and is embedded to it would fall under the ALI Principles, although EU law would consider it a transaction in goods.

1.2 Digital Rights Management

The aim of this section is to briefly outline what is understood by DRM, in what way can DRM interfere with consumer rights and what negative effects they may have.

1.2.1 Definition of DRM and their negative effects

DRM is a broad term and literature defining it is voluminous. According to Lucchi ‘DRM refers to any technologies and tools which have been specifically developed for managing digital rights or information.’³⁰ Hoffer defines DRM as ‘technology that copyright holders may use to permit or restrict access to digital content’³¹; Robinson states that ‘DRM is typically software or another technological method used to control access to a work.’³² These and other definitions of DRM point to a fact that DRM are used by copyright holders for the purposes of management of rights granted to the user of digital content. In other words, DRM enable copyright holders to set rules of access and use of digital content as well as to enforce these rules.

DRM have evolved as a consequence of general technological development and nowadays there are number of them with different nature, characteristics and purpose. The first DRM were

³⁰ Lucchi (n 2) 93.

³¹ Alicia Hoffer, ‘A Matter of Access: How Bypassing DRM Does Not Always Violate the DMCA’ (2011) 7 Washington Journal of Law, Technology & Arts 13, 14.

³² Dana B Robinson, ‘Digital Rights Management Lite: Freeing Ebooks from Reader Devices and Software. Can Digital Visible Watermarks in ebooks Qualify for Anti-circumvention Protection under the Digital Millenium Copyright Act?’ (2013) 17 Virginia Journal of Law & Technology 152, 154.

intended to prevent unauthorized copying,³³ while later developed DRM are much broader and restrict viewing, copying, printing, extracting, and altering of content protected by the intellectual property rights.³⁴

An objective of using DRM is to protect a copyright holder against an unauthorized access or use of digital content. However, a fact that the copyright holder exercises technical control over consumer's use of the digital content can lead into situations where the consumer is limited more than is necessary in his possibility to use the content, although it was legally purchased or otherwise obtained. In certain cases these limitations might even violate rights of the consumer or other legal provisions.

Several examples of cases when DRM negatively affect use and access to digital content can be found. Some DRM are able to track behavior of an individual when using or accessing digital content, or track his location or even collect and store his personal data.³⁵ Other DRM prevent access to digital content unless on a specific device or with compatible software. This is a result of an interoperability requirement caused by DRM presence in the digital content. A user who

³³ Early DRM were aimed to prevent the copying of floppy disks, video cassettes and CDs. DRM software tied the executable file to the disc in order to prevent the access to the content unless using a legitimate disc. Peter Holm, 'Piracy on the Simulated Seas: the Computer Games Industry's Non-Legal Approaches to Fighting Illegal Downloads of Games' (2004) 23 Information & Communications Technology Law 61, 65.

³⁴ Loos and others point out that the terms Technical Protection Measures ('TMP') and DRM are often used interchangeably, however they are of an opinion they should be distinguished. They argue that TPM's function is to 'impede access or copying, while DRM systems do not impede access or copying *per se*, but rather create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the rightholders.' Loos and others (n 17) 22.

³⁵ This can happen by several means, for instance when a user provides personal information in order to subscribe to online services or via downloading. Moreover, the content can be tied to a particular device on the basis of prior provision of the user's personal information. As a result of this ability to collect personal information and track the location and behavior, personal profiles of users can be created. Ann Cavoukian, 'Privacy and Digital Rights Management (DRM): An Oxymoron?' (Information and Privacy Commissioner, Ontario, 2002) 4-5 <<https://www.ipc.on.ca/images/Resources/up-1drm.pdf>> accessed 8 February 2015.

does not have the right interoperable device, or the compatible hardware or software, is limited in his right to use the digital content although the access to it was obtained lawfully.³⁶

Nicola Lucchi provides another example when the use of DRM had negative effects on legitimate rights of users and consumers.³⁷ Firstly he mentions an example of a digital content provider whose terms and conditions applicable to the contract with a user contained a provision enabling to the provider to change at any time and at its sole discretion the terms of use of the digital content downloaded from its website.³⁸ This term was enforceable by means of DRM. The second illustration he makes refers to a case where DRM automatically installed software into the users' computers, which then interfered with the operating system and enabled collection of information from the computer.³⁹

Robert Oakley mentions contract terms, that are usually enforced by DRM and that are presumptively unfair, unless the user has been clearly notified about them. Such clauses include terms that permit to modify a user's system,⁴⁰ clauses limiting period of time during which digital content will be available,⁴¹ clauses leaving a 'backdoor' into the user's system, or provisions permitting to update the system or install security fixes.⁴² He also points to the unfairness of the contract provisions that prevent users from such a use of copyrighted digital

³⁶ For more on discussion on the interoperability and DRM see Mikko Välimäki and Vilho Oksanen 'DRM Interoperability and Intellectual Property Policy in Europe.' (2006) 2 <http://www.valimaki.com/org/drm_interoperability_final.pdf> accessed 8 February 2015.

³⁷ Lucchi (n 2) 94–99.

³⁸ *ibid*, 94.

³⁹ *ibid*, 97–98.

⁴⁰ Robert L Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-negotiated Contracts' (2005) 42 *Houston Law Review* 1041, 1089. See also Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203, 1268–73.

⁴¹ *ibid*.

⁴² Through this 'backdoor' the software manufacturer can actually access or even control a user's data. Oakley (n 40) 1090. The author also makes a reference to a case, where a computer program made changes to the users' systems that prevented them from running other programs or accessing their personal files. Oakley (n 40) 1088. *Williams v America Online, Inc* [2001] Not Reported in NE 2d, 2001 WL 135824.

content that would be otherwise considered fair, for example quoting or using excerpts in a review or a new work, commenting, criticizing or teaching, or even reverse engineering.⁴³

It follows that DRM can have various negative effects and this subsection provided only some examples of them. A detailed analysis of these issues from the legal perspective would require a very broad approach involving privacy law, contract law, competition law or even constitutional law. Due to the limited scope of this thesis these complex views had to be omitted from the analysis, nevertheless, considering that the most negative effects arise in copyright area, the following section briefly outlines a copyright law perspective of DRM.

1.3 Copyright law perspective of DRM

Although not all digital content, a major part of it is protected by copyright, while the main purpose of DRM is copyright protection and enforcement. Presence of DRM in digital content can result in extension of the copyright holders' privileges and simultaneous restrictions of the users' full benefit of copyright exceptions and limitations. The aim of this section is to briefly explain the copyright approach to this question in both EU and US law.

1.3.1 EU copyright perspective

Technological measures that are 'designed to prevent or restrict acts not authorized by the rightholders of any copyright, rights related to copyright or the sui generis right in databases'⁴⁴ are in EU law regulated, *inter alia*, by the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ('Infosociety Directive'). The Infosociety Directive requires member states to provide the technological measures with legal protection against

⁴³ Oakley (n 40) 1093–96.

⁴⁴ Infosociety Directive, recital 47.

illegal activities that aim to circumvent them.⁴⁵ This obligation derives from Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty.⁴⁶

At the same time, the Infosociety Directive contains a list of exceptions or limitations of the reproduction right, the right of communication to the public and the right of making available to the public, and the distribution right, that member states may provide for in their implementing national legislative acts.⁴⁷ The Directive assumes that the rightholders themselves, when adopting the technological measures, will take voluntary measures aimed at users' possibilities to benefit from these exceptions or limitations, and it provides that such voluntary measures can include agreement concluded with a third party.⁴⁸ In case no voluntary measure is taken by the copyright holder, then the Directive requires the member states to adopt appropriate measures.⁴⁹

For a user this means that measures aimed at respecting limitations and exceptions to the rightholders' privileges should be in the first place carried out by the rightholders themselves on a voluntary basis, while the state's measures are subsidiary.⁵⁰ Although the implementation of these provisions into the national legislations of the member states differ⁵¹, in general such

⁴⁵ Infosociety Directive, recital 47–48, art 6.

⁴⁶ WIPO Copyright Treaty (1996) and WIPO Performances and Phonograms Treaty (1996).

⁴⁷ Infosociety Directive, arts 2–5.

⁴⁸ *ibid*, art 6(4).

⁴⁹ *ibid*. The Court of Justice of the European Union ('CJEU') held that in some cases it can be legal to circumvent the technological protection measures, while the national courts should assess whether their use is proportionate (ie whether another measure could be less interfering). The national courts have to take into account factors such as the costs of the measures and how they disregard copyright, and the purpose of the circumvention device. The legal protection under the Infosociety Directive should be provided only to those technological measures that are proportionate. Case C-355/12 *Nintendo Co Ltd and Others v PC Box Srl, 9Net Srl* [2014] OJ C 93/8.

⁵⁰ Lucchi (n 2) 107.

⁵¹ For example, in Ireland a beneficiary has a direct recourse to a court if the voluntary measures does not allow him to benefit from the exception. Similar solution has been adopted in Germany and Luxembourg. In the UK the beneficiary can submit a complaint to the Secretary of State. In some countries, such as Greece, Lithuania and Slovenia, the beneficiary has a recourse to mediation. Urs Grasser and Michael Girsberger, 'Transposing the Copyright Directive: Legal Protection of

a legal regulation puts the user into quite a difficult position with regard to claiming benefits from the exceptions or limitations of copyright.⁵²

1.3.2 US copyright perspective

US law, similarly to EU law, protects rightholders and enables them to adopt technological protection measures. US law also recognizes that copyright is not unlimited, and that there are exceptions and limitations to it, mainly under the fair use doctrine.⁵³

The fair use doctrine is based on a principle that ‘every user, author or publisher may make limited use of another person’s copyrighted work, without permission, for purposes such as criticism, comment, news, reporting, teaching, scholarship and research’.⁵⁴ The fair use doctrine is ‘a highly flexible common law doctrine’.⁵⁵ Rather than listing all the exceptions or limitations to copyright, the doctrine uses criteria that the court will consider and balance in order to see whether in the particular case the user can be exempted from the copyright

Technological Measures in EU-Member States. A Genie Stuck in the Bottle?’ (The Berkman Center for Internet & Society at Harvard Law School, Berkman Publication Series no. 2004-10, 2004) 19–21.

⁵² Lucchi (n 2) 107. MacQueen argues that the rightholders can make it difficult for consumers to benefit from this provision and that with regard to subsidiary state measures several aspects are unclear, such as a time period before the state should adopt the measure, and competence of the state to take the measure against the rightholders based in another member state. H MacQueen, ‘Copyright and the Internet’ in L Edwards and C Waelde (eds), *Law and the Internet* (Hart Publishing, 2000) 217, as cited by John Dickie, *Producers and Consumers in EU e-Commerce Law* (Hart Publishing, 2005) 103.

⁵³ Other recognized exemptions are, *inter alia*, format shifting, personal copying, time shifting, back-up copying, reverse engineering. David B Adler and others, ‘United States’ in Neville Cordell (ed), *Intellectual Property and the Internet: a Global Guide to Protecting Intellectual Property Online* (Globe Law and Business 2014) 447–449. Limitations on exclusive rights arise also under the first sale doctrine, the principle of transformative use and public domain information. Michael Rustad, *Internet Law in a Nutshell* (West 2009) 310–13.

⁵⁴ FS Grodzinsky and MC Bottis, ‘Private Use as Fair Use: Is it Fair?’ 37 (2007) SIGCAS Computers and Society 11, 12.

⁵⁵ Bechtold S, ‘Digital Rights Management in the United States and Europe’ (2004) 52 The American Journal of Comparative Law 323, 359.

infringement liability.⁵⁶ In *Sony v. Universal Studios*⁵⁷ the court held that there was no ‘rigid, bright–line approach to fair use’.⁵⁸

US law, similarly to EU law, protects the technological measures that are applied in order to prevent an unauthorized access to copyrighted works.⁵⁹ The Digital Millennium Copyright Act⁶⁰ makes illegal any circumvention of effective technological measures which is made in order to access a copyrighted work, as well as trafficking of circumventing devices, and manufacturing and distribution of circumventing devices.⁶¹ Due to this system of protection the rightholders are able to extensively control the use of the works by the consumers.⁶² However, in contrast to EU law, US law does not assume that the copyright holders will voluntarily adopt measures allowing users to benefit from copyright exceptions and limitations. As a consequence, the DRM have in many cases compromised consumers rights, although the original purpose of the outlined legal regulation was to prevent piracy.⁶³

1.3.3 Assessment

Although both EU and US law recognize that copyright is not unlimited, they at the same time allow the rightholders to use self-help⁶⁴ in the form of technological measures and provide them

⁵⁶ The four statutory criteria, that courts take into consideration, are contained in § 107 of the Copyright Act (17 USCA) and they are namely the following:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect on the potential market for or value of the copyrighted work.

⁵⁷ Case *Sony Corp of America v Universal City Studios, Inc* [1984] 464 US 417, 450.

⁵⁸ Grodzinsky and Bottis (n 54) 12.

⁵⁹ 17 USCA § 1201 (1998).

⁶⁰ The Digital Millennium Copyright Act (1998).

⁶¹ 17 USCA § 1201(a)(1), § 1201(a)(2), § 1201(b)(1) (1998).

⁶² Niva Elkin-Koren, ‘Making Room for Consumers under the DMCA’ (2007) 22 Berkeley Technology Law Journal 1119, 1127–28.

⁶³ *ibid*, 1128.

⁶⁴ Dickie (n 52) 96.

with quite broad legal protection. As already argued, this can lead into situations when legal protection provided to the rightholders and their technological measures conflicts with protection of consumers' (but also users' in general) rights and legitimate expectations.

This conflicting outcome can be explained by different underlying positions of consumer law and copyright law: while consumer law is consumer centric, it protects a consumer as a weaker party, and focuses on his reasonable expectations and his ownership of purchased goods, copyright law is rightholders centric and it protects their ownership that does not pass onto the transferee.⁶⁵ With regards to digital content this relationship is complicated by a fact that the consumer is in general a licensee that does not have 'full ownership' of the content, while the copyright holder retains the ownership and can exercise some influence over the content's use.⁶⁶

To sum it up, in professor Samuelson's words, 'DRM has more than one potential relationship with the law: it can enforce legal rights; it can displace legal rights; it can override legal rights; and the law can constrain the design of DRM.'⁶⁷ The system of exceptions and limitations is aimed at achieving a balance between rightholders' and users' interests, while DRM can disrupt this balance.⁶⁸ When digital content is protected by technological measures and the technological measures are legally protected against circumvention, users that would otherwise rely on an exception or a limitation, have to look for other alternatives.⁶⁹ One of many related questions is whether an imbalance possibly created by DRM could then be corrected by consumer protection rules. This question will be dealt with in the following chapters.

⁶⁵ Natali Helberger and others, 'Digital Content Contracts for Consumers' (2013) 36 *Journal of Consumer Policy* 37, 46. Natali Helberger and P Bernt Hugenholtz, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law' (2007) 22 *Berkeley Technology Law Journal* 1061, 1078.

⁶⁶ Helberger and others (n 65) 46.

⁶⁷ Samuelson (n 5) 45.

⁶⁸ Andrej Savin, *EU Internet Law* (Edward Elgar 2013) 128.

⁶⁹ *ibid*, 141.

CHAPTER 2 - The EU Legal Framework

Rules aimed at consumer protection in electronic commerce in EU law are in general contained in a number of directives. These legal provisions were adopted in order to set up a framework for electronic commerce, which creates favorable conditions for full exploitation of potential of cross-border distance selling in the internal market and at the same time protects consumers' rights.⁷⁰ Since the consumer protection rules in e-commerce constitute a large part of EU law, this thesis first of all aims to define which of these rules are relevant in case of use of DRM technologies in digital content purchased or accessed online by a consumer. As will be shown throughout this chapter, the wording of the provisions in some cases clearly suggests that DRM and digital content fall under their scope, while in other cases this question can be controversial. For the purposes of a comparative analysis with the US legal framework, the thesis will focus on the most essential legal concepts such as the information obligations, the right of withdrawal, the unfair contractual terms and unfair commercial practices.

2.1 Applicable legal provisions

In order to define legal provisions that are relevant for this thesis, one needs to focus on regulation of consumer contracts concluded by electronic means and regulation of transactions involving digital content.

As it was already mentioned, a definition of digital content was introduced to EU law by the Directive on Consumer Rights. This Directive thus represents the corner-stone regulation of the consumer contracts involving digital content. In particular it provides for the pre-contractual information obligation and the right of a consumer to withdraw from a distance contract.⁷¹

⁷⁰ See for example Directive on Consumer Rights, recital 5.

⁷¹ A distance contract is defined as 'any contract concluded between a trader and a consumer under an organized distance sale with the exclusive use of one or more means of distance communication (such

Another important act relevant for the topic of this thesis is the Directive 2000/31/EC on Electronic Commerce.⁷² This Directive provides for the approximation of national laws regarding contracts concluded by electronic means. It was adopted much earlier than the Directive on Consumer Rights and therefore does not mention digital content, however, is applicable to electronic transactions in goods and thus its provisions are relevant when reference is made to digital content supplied on a tangible medium. The information obligation of a trader toward a consumer, which will be closely analyzed later in this thesis, is governed by both the Directive on Electronic Commerce and the Directive on Consumer Rights. The Directive on Consumer Rights supplements the Directive on Electronic Commerce and in case of any conflict, the provisions of Directive on Consumer Rights prevail.⁷³

Unfair commercial practices are in EU law regulated by the Unfair Commercial Practices Directive.⁷⁴ It applies to unfair business-to-consumer commercial practices, before, during and after a commercial transaction in relation to a ‘product’. Since the ‘product’ is defined broadly, meaning ‘any goods or service including immovable property, rights and obligations’⁷⁵ there is no doubt that this Directive applies also to e-commerce consumer transactions relating to digital content.

Lastly, important measures of consumers’ protection are provisions restricting or forbidding unfair contractual terms. They are especially relevant for this thesis because the terms and

as a mail order, internet, telephone or fax)’. Directive on Consumer Rights, recital 20. As the definition suggests, all the contracts concluded online are considered distance contracts.

⁷² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 (Directive on Electronic Commerce).

⁷³ Directive on Consumer Rights, art 6(8), recital 12.

⁷⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (Unfair Commercial Practices Directive).

⁷⁵ Unfair Commercial Practices Directive, art 2.

conditions of online consumer contracts for provision of digital content are in most cases rather drafted in advance than negotiated individually. The unfair contractual terms are subject of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.⁷⁶

Specific provisions of the mentioned Directives which are of relevance for the topic of this paper, ie those that are applicable to digital content with DRM, will be analyzed in more details in the following sections.

2.2 Information obligation

Protection of consumers' rights in on-line contracting is in the first place ensured by quite extensive transparency requirements that a trader⁷⁷ must comply with. EU law obliges the trader to provide information *inter alia* about the main characteristic of the subject matter of the contract, whether it is goods or service or digital content, the right of withdrawal and the applicable contractual terms and conditions. This means that when a consumer considers whether to enter into an on-line contract for provision of digital content which includes DRM, sufficient and understandable information about this fact should be available to him so he is able to freely decide.

This section outlines formal and substantive requirements of the information provided before and after the conclusion of an online contract entered into by a consumer under EU law.

⁷⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 095/29 (Directive on Unfair Terms in Consumer Contracts).

⁷⁷ The Directive on Consumer Rights uses the term 'trader' and defines it in Article 2(2) as 'any natural person or any legal person (...) who is acting, including through another person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive'. Similar definition is used by the Unfair Commercial Practices Directive in Article 2(b). The Directive on Unfair Terms in Consumer Contracts uses other denominations, such as supplier and seller. For the purposes of the unity of terminology of this thesis, 'trader' will be used in order to identify the other party in the contract concluded with a consumer.

2.2.1 *Formal requirements of pre-contractual information*

Mandatory information should be provided to a consumer before he is bound by a contract in a clear and comprehensible manner.⁷⁸ The Directive on Consumer Rights provides that in case of distance contracts concluded through a website⁷⁹ the consumer should be able to ‘fully read and understand the main elements of the contract before placing his order’, therefore ‘those elements should be displayed to the close vicinity of the confirmation requested for placing the order’.⁸⁰ The pre-contractual information should be made available to the consumer in a plain and comprehensible language and if provided on a durable medium⁸¹ it has to be legible.⁸² The aim of these provisions is to avoid any deception and to provide easily understandable and accessible information for the consumers who shop online.

2.2.2 *Substantive requirements of pre-contractual information*

The trader is obliged to inform the consumer in particular about the main characteristics of the goods and services, to the extent appropriate to the medium and to the goods and services and

⁷⁸ In the case of a website the information should be provided before the consumer commits himself, eg before he clicks on ‘I agree’ or similar button. Savin (n 68) 163–64.

⁷⁹ As mentioned in the section 2.1 of the thesis, the information obligation is also governed by the Directive on Electronic Commerce, which is supplemented by the Directive on Consumer Rights. According to the Directive on Electronic Commerce, the consumer has to be informed, for instance, about the technical steps that he has to follow to conclude the contract (art 10(1)) and he must have access to the contract terms and general conditions in a way that allows storing and reproduction (art 10(3)).

⁸⁰ Directive on Consumer Rights, recital 39.

⁸¹ A durable medium is under the Directive on Consumer Rights defined as ‘any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.’ From the CJEU’s case law it follows that it is not excluded that a durable medium could be also a website, if it meets the above mentioned requirements of allowing the consumer to store the information in such a way that it can be accessed and reproduced in an unchanged form during an reasonable period without the other party being able to change the content. Case C-49/11 *Content Services Ltd v Bundesarbeitskammer* [2012] OJ C 287/8, para 46.

⁸² Directive on Consumer Rights, art 8(1).

the conditions for exercising the right of withdrawal.⁸³ Furthermore, with regards to the digital content the trader has to inform the consumer about the functionality of the digital content, ‘including applicable technical protection measures’⁸⁴; and any relevant requirement of ‘interoperability with hardware and software that the trader of digital content is aware of or could reasonably be expected to be aware of’.⁸⁵

By the functionality of digital content it is meant ‘the ways in which digital content can be used, for instance for the tracking of consumer behavior; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding.’⁸⁶ It follows that this information about the functionality should include cookies, digital watermarking, restrictive DRM that are used to control or restrict access to the digital content or to enforce payment and compliance with contractual terms.⁸⁷

By the information about any relevant requirement of the interoperability it is meant ‘the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features.’⁸⁸ Natali Helberger and others note the dynamic character of the mentioned definition of the interoperability, which takes into account subsequent updates of the software and hardware.⁸⁹

⁸³ Directive on Consumer Rights, art 6(1)(a), art 6(1)(h).

⁸⁴ *ibid*, art 6(1)(r).

⁸⁵ *ibid*, art 6(1)(s).

⁸⁶ *ibid*, recital 19.

⁸⁷ Helberger and others (n 65) 49.

⁸⁸ Directive on Consumer Rights, recital 19.

⁸⁹ Helberger and others (n 65) 48.

2.2.3 *Confirmation of the contract*

The same information that must be provided prior to the conclusion of a contract is to be contained in the confirmation of the contract. The trader has to provide the confirmation to the consumer on a durable medium within a reasonable time after the conclusion of the contract, however, no later than at the time of delivery of the goods or prior the beginning of the performance of the service, unless all the information has already been provided on a durable medium prior to the conclusion of the contract.⁹⁰ Although there is no express provision on when the confirmation should be provided in case of a contract for the supply of online digital content, on the basis of an analogy with the rules on service contracts, it should be provided prior to the beginning of the performance of the contract.⁹¹ Although for a consumer it is crucial to have sufficient information before he enters into a contract, this provision ensures that he is also able to refer to the relevant information later on, typically when claiming his rights.

2.2.4 *Assessment*

The Directive on Consumer Rights is an important achievement in terms of clarifying whether a trader should inform a consumer prior to the conclusion of a contract on the presence of DRM or other technologies restricting the use of digital content; the question which was before rather controversial.⁹² Already under the Distance Selling Directive⁹³ it was not quite clear whether the presence of DRM would fall under the ‘main characteristics’ of the goods or services about

⁹⁰ Directive on Consumer Rights, art 8(7).

⁹¹ European Commission - DG Justice (n 14) 36.

⁹² Helberger and Hugenholtz (n 65) 1090–93 as cited by Helberger and others (n 65) 48.

⁹³ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144/19 (Distance Selling Directive). The question is not dealt with by the Directive on Electronic Commerce, which was adopted subsequently and which is without prejudice to the protection provided by the Distance Selling Directive (Directive on Electronic Commerce, recital 11). It provides for an obligation to inform ‘on the essential elements of the content of the contract’ in the recital 56.

which the trader should inform the consumer.⁹⁴ This uncertainty persists also under Article 6(1)(a) of the Directive on Consumer Rights, which moreover expressly apply only to the goods and services without mentioning digital content. Including an explicit provision on obligation to inform about DRM, functionality and operability is therefore a welcome solution in favor of legal certainty. What is also essential is an express provision obliging the traders to provide the information in a clear manner and an understandable language, which means that the trader has to find a way how to inform in a simple language on relatively complex technical issues, which are otherwise usually incomprehensible to an average consumer. The trader should thus make sure that the consumer understands the effects (for example that using a particular downloaded software might violate his privacy) rather than the nature of the DRM.

A general conclusion can be drawn from the previous analysis of the relevant Directive's provisions according to which the consumer is under EU law protected against the negative effects of DRM by obtaining information about their existence and presence in digital content before the conclusion of a contract.

2.3 Right of withdrawal

Despite the rules on transparency and information obligation, that are aimed to prevent the consumer's confusion or lack of clarity about the main characteristics of the contract, a consumer might end up disappointed about functioning or nature of digital content. The fact that the consumer is usually not able to see or try the digital content before entering into the contract is therefore balanced by the right of withdrawal.

⁹⁴ Distance Selling Directive, art 4(1)(b).

Under EU law, a consumer has 14 days to withdraw from a distance contract without giving any reasons and in principle without bearing any costs.⁹⁵ In case of digital content supplied on a tangible medium, the withdrawal period expires 14 days from the day on which the consumer ‘acquires physical possession of the goods’⁹⁶ and in case of digital content not supplied on a tangible medium, 14 days from the day of the conclusion of the contract.⁹⁷ As a consequence of the withdrawal, the consumer is obliged to return the goods and the trader is obliged to reimburse all the payments which he received from the consumer.⁹⁸ The consumer is allowed to use the digital content during the withdrawal period with due care and only in order to examine its ‘nature, characteristics and functioning’.⁹⁹ In case of a more extensive use, the right of withdrawal can nevertheless be exercised, however the consumer shall be obliged to compensate the trader for any decreased value of the goods resulting therefrom.¹⁰⁰

In some cases a consumer cannot exercise the right of withdrawal. Firstly, it is a case when the consumer agrees that performance of the contract begins during the withdrawal period provided his prior acknowledgement of the loss of the right of withdrawal.¹⁰¹ This also applies to a contract for the supply of digital content that is not provided on a tangible medium.¹⁰² Secondly, if the subject matter of a contract is the supply of sealed audio or video recordings or computer software which the consumer unsealed, the right of withdrawal does not exist at all.¹⁰³ In this

⁹⁵ The consumer has to bear only limited costs, such as direct expenses resulting from the return, unless they are borne by the trader as a consequence of failing to inform the consumer or based on the trader’s consent. Directive on Consumer Rights, art 9(1), art 14(1). In *Pia Messner v Firma Stefan Krüger* the CJEU held that the withdrawing consumer may be required to pay compensation for the use of the goods in accordance with the national law’s principles, eg as a compensation for unjust enrichment. Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] OJ C 256/4.

⁹⁶ Directive on Consumer Rights, art 9(2)(b).

⁹⁷ *ibid*, art 9(2)(c).

⁹⁸ *ibid*, art 13, 14.

⁹⁹ *ibid*, recital 47, art 14(2).

¹⁰⁰ *ibid*.

¹⁰¹ *ibid*, recital 19.

¹⁰² *ibid*, art 16(m).

¹⁰³ *ibid*, art 16(i).

case there is no requirement of the consumer's prior express consent or acknowledgment of this fact.

2.3.1 Assessment

Digital content nowadays is most of the time provided online immediately or shortly after the conclusion of the contract, rather than supplied on a tangible medium. In such cases, the consumer is asked to provide his consent with the start of performance of the contract and confirm an acknowledgment of the loss of right of withdrawal. If he subsequently becomes dissatisfied with the digital content, there is no possibility to withdraw from the contract and return it anymore. This solution takes into consideration the nature of digital content supplied online, which cannot be returned without the possibility that a user keeps a copy once it is downloaded or installed. Absence of the right to withdraw is also balanced by the obligation to inform the consumer in a proper manner before the conclusion of the contract about the existence of DRM, and functioning and interoperability of digital content.

It follows that the obligation to inform has an important function in protecting consumers against negative effects of DRM. In fact, the right to withdraw is considered to be an information-type instrument, because its purpose is an informed choice of the consumer after the conclusion of the contract.¹⁰⁴ In general, failure to provide proper information about use of DRM, or providing misleading information can be considered an unfair commercial practice.¹⁰⁵

¹⁰⁴ Norbert Reich, 'Crisis or Future of European Consumer Law?' in Deborah Parry and Annette Nordhausen (eds) *The Yearbook of Consumer Law 2009* (Ashgate 2009) 3, 8.

¹⁰⁵ Loos and others (n 17) 58–59.

This is the case in some member states like Finland¹⁰⁶ and Germany.¹⁰⁷ However, the Directive itself does not provide any sanction and therefore the consequences are regulated by the applicable national laws. This also means that consumer protection, despite quite detailed regulation at the EU level can, reach different standards in individual member states.

2.4 Unfair contractual terms

Among the most important measures of consumer protection in EU law there are rules concerning unfair contractual terms and unfair commercial practices. Their objective is to protect a consumer as a weaker party and his ability to freely decide on his rights and obligations when contracting with a trader. The provisions that are relevant for the scope of this thesis will be analyzed below.

Under the Directive on Unfair Terms in Consumer Contracts ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.’¹⁰⁸ This provision is of a particular importance when dealing with online consumer contracts, because in general individual negotiation of their terms is practically non-existing. The Directive also provides for a non-exhaustive list of contractual

¹⁰⁶ J Laine, ‘Finland’ in University of Amsterdam (ed), ‘Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services’ (Report 1: Country Reports, 2011) 27

<http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015.

¹⁰⁷ P Rott, ‘Germany’ in University of Amsterdam (ed), ‘Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services’ (Report 1: Country Reports, 2011) 93, 108

<http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015.

¹⁰⁸ Directive on Unfair Terms in Consumer Contracts, art 3(1).

terms that are considered to be unfair.¹⁰⁹ For the purposes of this thesis above all these provisions are relevant: terms that enable to a trader ‘to alter the terms of the contract unilaterally without a valid reason which is specified in the contract’;¹¹⁰ and terms that enable to a trader ‘to alter unilaterally without a valid reason any characteristics of the product or service to be provided’.¹¹¹ The Directive also provides that any written terms must always be in an intelligible language, while any doubt concerning interpretation of a term will result in the application of the most favorable meaning to the consumer.¹¹² Nevertheless, it is important to mention that the terms defining the main subject matter and price or remuneration are not subject to the assessment of unfairness.¹¹³

A consequence of presence of an unfair contractual term in a consumer contract is that the contract will be binding upon the contractual parties without the unfair term, if such a solution is possible.¹¹⁴ The CJEU held that the term is not binding on the consumer, who also does not have to contest the validity of the term explicitly.¹¹⁵ EU law does not stipulate how a non-binding clause is to be replaced, therefore this is to be determined by national laws.¹¹⁶

2.4.1 Assessment

Although the above mentioned rules are without any doubt a very important measure of protection for European consumers, they are rather general and contain legal terms that can be interpreted in several ways. For the purposes of this thesis it is important to ask whether these

¹⁰⁹ Directive on Unfair Terms in Consumer Contracts, art 3(3) and Annex.

¹¹⁰ *ibid*, Annex, point (j).

¹¹¹ *ibid*, Annex, point (k).

¹¹² *ibid*, art 5.

¹¹³ *ibid*, art 4(2).

¹¹⁴ *ibid*, art 6(1).

¹¹⁵ Case C-243/08 *Pannon GSM Zrt v Sustikné Győrfi Erzsébet* [2009] ECR I-4713.

¹¹⁶ Bundesgerichtshof, Urteil vom 12.10.2005 - IV ZR 162/03.

broad provisions can be interpreted in such a way as to protect consumers against negative effects of DRM present in digital content.

As already mentioned, according to the Directive on Unfair Terms in Consumer Contracts, the terms defining the main subject matter are not subject to the assessment of unfairness.¹¹⁷

Considering the fact that DRM can have a diverse nature and functions, it is not certain whether a contractual term referring to presence of DRM in a particular case would relate ‘to the definition of the main subject matter of the contract’¹¹⁸ and as a consequence would be exempted from the assessment of the unfairness. For example, if a consumer buys online an e-book, which could be accessed on a particular type of a device only due to lack of interoperability with other hardware, it is probable that this fact would relate ‘to the definition of the main subject matter’.¹¹⁹ In some other instances this question would be more controversial, as for the case of a consumer buying an e-book, where due to presence of DRM the number of private copies that the consumer can make is limited. Although limiting the number of private copies would in most cases be a violation of copyright regulation, it is not certain whether this fact would fall under the main subject matter and therefore whether such a term could be found unfair and invalid.¹²⁰

In member states the prevailing practice is to interpret the term ‘main subject matter’ of a contract narrowly,¹²¹ and in a few countries, even the main subject matter of a contract can be

¹¹⁷ Directive on Unfair Terms in Consumer Contracts, art 4(2).

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ Loos and others (n 17) 88.

¹²¹ This follows from German, Dutch and the United Kingdom’s courts case law, from opinions of Spanish legal scholars and from Polish law. *ibid.*, 90–91; S Cámara Lapuente and R Yanguas Gómez, ‘Spain’ in University of Amsterdam (ed), ‘Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services’ (Report 1: Country Reports, 2011) 331 <http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015; C Willett and M Morgan-Taylor, ‘United Kingdom’ in University of Amsterdam (ed), ‘Digital Content Services for

assessed for unfairness.¹²² This means that only very few terms should be left outside the unfairness test. The case law of member states also provides an indication of what terms can be declared unfair. For instance, in Hungary, terms restricting use of content have to be reflected in the price, otherwise they could be found unfair.¹²³ In France, a term restricting the private copy exception to copyright would be essential characteristics of a work that has to be brought to the user's attention.¹²⁴ In some member states terms restricting playability or copying would be according to some opinions considered unfair if they are too broad and not disclosed to the consumer.¹²⁵ In Spain, terms preventing copying music content or geographically restricting playability would probably not be classified as a main obligation in a contract,¹²⁶ but they have not been found unfair in case law.¹²⁷ Finally, the member states incline to consider as unfair the terms that breach privacy.¹²⁸

2.5 Unfair commercial practices

EU law also aims to protect consumers through prohibition of unfair commercial practices. As already stated, the unfair commercial practices are regulated by the Unfair Commercial Practices Directive. Under this Directive a commercial practice shall be considered unfair if it does not meet standards of professional diligence and if it is capable of materially distorting a

Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services' (Report 1: Country Reports, 2011) 369

<http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015.

¹²² In Finland and Spain. Loos and others (n 17) 89.

¹²³ *ibid*, 90.

¹²⁴ *ibid*, 88–89.

¹²⁵ Rott (n 107) 99.

¹²⁶ Lapuente and Gómez (n 121) 331.

¹²⁷ Lucie Guibault, 'Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment' (2008) 31 *Journal of Consumer Policy* 409, as cited by Loos and others (n 17) 89.

¹²⁸ Loos and others (n 17) 93.

consumer's economic behavior.¹²⁹ More precisely, an unfair commercial practice is capable 'to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transaction decision that he would not have taken otherwise'.¹³⁰ The transactional decision is similarly to be defined broadly, including any decision taken by a consumer with regard to a purchase, both prior and following the purchase.¹³¹

Furthermore, the Unfair Commercial Practices Directive, *inter alia*, prohibits any misleading practice or misleading omissions. The misleading practices contain false information or even factually correct information about nature of a product or its main characteristics (such as fitness for purpose, usage, or the results to be expected from its use), if it is likely to deceive an average consumer and cause him 'to take a transaction decision that he would not have taken otherwise'.¹³² The misleading omissions are in general unfair practices that omit material information that an average consumer needs in order to take an informed transactional decision.¹³³ Any hiding of the material information or provision of the material information in an unclear unintelligible or ambiguous manner shall be also regarded as the misleading omission and thus an unfair commercial practice.¹³⁴

It follows that the rules providing for the protection against unfair commercial practices aim, similarly to the information obligation under the Directive on Consumer Rights, to achieve

¹²⁹ Unfair Commercial Practices Directive, art 5(2).

¹³⁰ *ibid*, art 2(e).

¹³¹ European Commission, 'Commission Staff Working Document: Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (SEC(2009) 1666, 3 December 2009) <http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf> accessed 8 February 2015, 23.

¹³² Unfair Commercial Practices Directive, art 6.

¹³³ *ibid*, art 7(1).

¹³⁴ *ibid*, art 7(2). Nevertheless, a trader is not obliged to provide information which is already apparent from the context. *ibid*, art 7(4).

sufficient level of awareness of a consumer in order to be capable to make informed decision about the transaction.

2.5.1 Assessment

In case of the Unfair Commercial Practices Directive, the conclusions regarding the negative effects of DRM are similar to those that were made in the case of the unfair contractual terms.

The misleading information about main characteristics of a product constitutes an unfair commercial practice and is forbidden. In this case, similarly to the information obligation under the Directive on Consumer Rights, a rather vague legal term ‘main characteristics’ is used. Although the relevant case law is scarce, some argue that this term should be interpreted broadly.¹³⁵ Considering that DRM has an impact on the fitness for purpose, usage, or results to be expected from the use of digital content, in my opinion it should be considered as one of its ‘main characteristics’. This argument can be supported by a study that showed that in some member states failure to inform about technical use restrictions of digital content could constitute an unfair commercial practice even before an express requirement to inform existed under the Directive on Consumer Rights.¹³⁶

Furthermore, the case law of the member states suggests that lack of mandatory information can be in general considered an unfair practice.¹³⁷ For example, not informing consumers about application of such measures that would prevent them from switching to different services or hardware has been regarded as unfair commercial practice in Finland, Italy, the Netherlands, and the United Kingdom.¹³⁸ Likewise, absence of prior information about the presence of DRM

¹³⁵ Thomas Wilhelmsson, ‘Misleading practices’ in Geraint G Howells, Hans W Micklitz and Thomas Wilhelmsson (eds), *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006) 140–41 as cited by Loos and others (n 17) 150.

¹³⁶ Loos and others (n 17) 52.

¹³⁷ This is the case, for example, in the United Kingdom. Willett and Morgan-Taylor (n 121) 368.

¹³⁸ Europe Economics (n 1) 24, 191, 238–39, 376, as cited by Loos and others (n 17) 150.

that prevents an unauthorized use or that restricts the use geographically¹³⁹ has been in some member countries considered an unfair commercial practice. Absence of information about functionality of content¹⁴⁰ can under Spanish law lead to voidability of the contract. It follows that absence of pre-contractual information constitutes an important aspect of unfairness.

2.6 Concluding notes on the EU legal framework

This chapter briefly analyzed a trader's obligation to inform and a consumer's right of withdrawal and at the same time dealt with protection of consumers against unfair commercial terms and practices, and their implications with regard to the negative effects of DRM. It was argued that these rules are important measures to protect consumers in electronic commerce transactions; however, in many cases it is not certain whether a particular provision should be interpreted in such a way as to cover DRM. One of the reasons is that the Unfair Commercial Practices Directive and the Directive on Unfair Terms in Consumer Contracts use more general legal terminology than the Directive on Consumer Rights, which is more specific and reflects the existence of digital content and DRM in several provisions.

Another point worth emphasizing is that, with regard to digital content and DRM, the protection of consumer is mainly ensured by obliging the other contractual party to provide the required information in a non-misleading way. The Directive on Consumer Rights, by providing for an explicit information obligation with regard to DRM, interoperability and functionality of digital content, makes it to a certain extent irrelevant whether these characteristics would fall under the 'main characteristics' of a product under the Unfair Commercial Practices Directive or under the 'main subject matter' under the Directive on Unfair Terms in Consumer Contracts.

¹³⁹ It was the case in the Netherlands and the UK. *Europe Economics* (n 1), 239, 378, as cited by Loos and others (n 17) 150.

¹⁴⁰ In Spain, where information about functionality, such as a format of content, software and hardware requirements, is one of 'the essential characteristics (...) of the goods'. Lapuente and Gómez (n 121) 334.

The reason for this is that once the consumer is informed in a clear and understandable manner about the presence of DRM, and the requirements of functionality and interoperability, the term or practice in question will hardly be declared unfair. Notwithstanding the lack of case law addressing this specific question, which would be based on the Directive on Consumer Rights, this conclusion can be assumed on the basis of the above mentioned member states' case law.

It follows that pre-contractual disclosure seems to remain the most important consumer protection measure under EU law. This solution, however, could be criticized for failing to address the actual negative effects of DRM. The fact that the consumer is informed about the presence of DRM, does not mean that he is also aware of its possible negative effects.¹⁴¹ Therefore the information obligations do not prevent the possibility that consumers' rights or legitimate expectations can be adversely affected by DRM.¹⁴² It remains to be seen how courts will deal with this question in the light of explicit information obligations provided for the Directive on Consumer Rights.

¹⁴¹ More aspects of the information paradigm will be discussed in the CHAPTER 4 – Comparison, in the context of comparison of the EU and the US legal approach.

¹⁴² Guibault, for instance, proposed as a solution to complement the indicative list of unfair contractual terms contained in the Directive on Unfair Terms in Consumer Contracts by provisions restricting negative effects, such as an explicit provision that a term that is contrary to the copyright regulation is also considered to be unfair. Guibault (n 127) as cited by Natali Helberger, 'Standardizing Consumers' Expectations in Digital Content' (2011) 13 info 69, 74.

CHAPTER 3 - The US Legal Framework

The US legal approach to consumer protection is not as specific as the one provided by EU law. Relevant rules are contained in both federal and state law and they are not limited to electronic commerce, but rather concern consumer transactions in general. The aim of this chapter is to outline the US legal framework applicable to consumer protection in electronic commerce with regard to DRM technologies.

Due to the particularities of US law this chapter will be structured in a different way than the chapter two. US law does not provide for strict requirements regarding information that should be disclosed to consumers prior to entering into an online contract,¹⁴³ but it rather focuses on the assessment of whether the transaction in question or particular terms were unfair or unconscionable. The goal is to protect consumers against deceptive or unfair practices. For these reasons this chapter does not contain a section on information obligations. It starts with a brief outline of sources of the applicable legal provisions, which is followed by a section containing analysis of the right to cancel a contract, and the last section is devoted to unfair terms and practices.

3.1 Applicable legal provisions

As it was already indicated, the US legal system consists of various sources and is very complex. Besides federal and state law¹⁴⁴ it is necessary to closely look at case law. Furthermore, an important role is played by legal principles and legal treatises followed by the

¹⁴³ For example under UCITA a vendor is not even expressly obliged to disclose product defects. David A Szwak, 'Uniform Computer Information Transaction Act [U.C.I.T.A.]: The Consumer's Perspective' (2002) 63 Louisiana Law Review 27, 39.

¹⁴⁴ State laws have crucial importance in both consumer protection in general and consumer protection in electronic commerce. The individual states enacted so called 'little FTC' acts that aim to protect against unfair and deceptive practices. Rustad (n 53) 217.

courts. This section will briefly outline which legal provisions could be applied to the consumer online contracting.

First of all, as argued in the subsection 1.1.2 of the thesis, although the UCC regulates sales of movable goods, it is also commonly applied to digital products including software.¹⁴⁵ The provisions concerning a right to return goods after inspection and unconscionability of contractual terms are relevant for the topic of this thesis. The right to return is also provided for in UCITA, however only with regards to computer information transactions. Furthermore, there are the ALI Principles that apply to transactions in software and whose subject matter is thus narrower than that of UCITA. The ALI Principles are not law in any US state jurisdiction and they become binding only if courts adopt them.¹⁴⁶ They are relevant because they regulate standard contractual terms. Finally, a reference should be made to the Restatement (Second) of Contracts as an important source of contract law. The Restatement of Contracts is a legal treatise outlining common law, prepared by the American Law Institute,¹⁴⁷ which enjoys authority among courts and lawyers. The Restatement is relevant with regard to the validity of standard contractual terms.

The following sections will provide a more detailed overview of the mentioned relevant provisions and their application on the subject matter of this thesis.

3.2 The right to cancel a contract

US law does not establish any general right to cancel a contract in case of distance contracts. Although the Federal Trade Commission¹⁴⁸ does provide a rule enabling a consumer to cancel

¹⁴⁵ Loos (n 17) 38.

¹⁴⁶ Robert A Hillman and Maureen A O'Rourke 'Principles of the Law of Software Contracts: Some Highlights' (2010) 84 Tulane Law Review 1519, 1519.

¹⁴⁷ Charles E Clark 'The Restatement of the Law of Contracts' (1933) XLII Yale Law Journal 643.

¹⁴⁸ The Federal Trade Commission ('FTC') is a federal agency that pursues consumer protection enforcement and has a rule-making authority. The rules created by the Federal Trade Commission are contained in Title 16 of the Code of Federal Regulations ('CFR'). The Federal Trade Commission,

a transaction within three business days after the date of the transaction,¹⁴⁹ this rule is only applicable to door-to-door sales.¹⁵⁰ Nevertheless, laws of some states provide consumers with the right to cancel the contract. For example under the law of California, consumers are allowed to cancel any contract concluded ‘by telephone, the internet or other electronic means of communication, mail order, or catalog in this state’ within 30 days;¹⁵¹ however a consumer has this right only in the case where his order was not fulfilled.¹⁵²

Consumers have a possibility to return digital content according to the UCC and UCITA under specific circumstances. The UCC allows a buyer to return goods if they do not conform to the contract and after he has had ‘a reasonable opportunity to inspect’ them.¹⁵³ Under UCITA, the right to return and a right to reimbursement of the price arise with regard to computer information for a licensee who has not had an opportunity to review license terms before his obligation to pay. Thus the licensee can return computer information if he does not consent to the terms after having had the possibility to review them.¹⁵⁴ The licensee is then entitled to the reimbursement of reasonable costs resulting from returning or destroying the computer information or from necessary reverse changes in the system.¹⁵⁵

‘About the FTC’ <<http://www.ftc.gov/about-ftc>> accessed 3 March 2015; The Federal Trade Commission, ‘Rules’ <<http://www.ftc.gov/enforcement/rules>> accessed 3 March 2015.

¹⁴⁹ 16 CFR § 429.1 (1995). For information on the revised rule effective as of 13 March 2015 see: ‘Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations’ 80 Federal Register (2015) 1329 <http://www.ftc.gov/system/files/documents/federal_register_notices/2015/01/150109coolingofffrn.pdf> accessed 4 March 2015.

¹⁵⁰ A door-to-door sale contract is concluded outside a place of business of a seller on the basis of the seller’s personal solicitation of the sale. 16 CFR § 429.0 (1995).

¹⁵¹ California Business and Professions Code, section 17538 (2014).

¹⁵² *ibid.*

¹⁵³ UCC § 2-606(1) (2002). Oakley (n 40) 1083.

¹⁵⁴ UCITA § 113(c) (2002).

¹⁵⁵ *ibid.*, § 209(b) (2002).

In some cases sellers themselves provide customers with a possibility to return the goods purchased online within a certain period of time in their terms and conditions.¹⁵⁶ Nevertheless, there is no general principle or provision establishing such a right under US law.

3.2.1 Assessment

The previous overview shows that under US law there is no general right to cancel a contract concluded online for whatever reason or without any reason. This right is at the federal level either limited to cases of non-conformity of goods (under the UCC) or consumer's disagreement with the license terms (under UCITA), and the time period within which it must be exercised is short. For the mentioned reasons, this constitutes only an exceptionally available measure with regard to consumer protection against DRM.

3.3 Unfair contractual terms and practices

US law does not regulate unfair contractual terms and practices on the federal level in a systematic way, likewise there are no specific rules addressing fairness with regard to consumer electronic contracting.¹⁵⁷ In general, the Federal Trade Commission Act,¹⁵⁸ the doctrine of unconscionability, the Restatement (Second) of Contracts and the doctrine of reasonable expectations apply when dealing with unfair terms.¹⁵⁹ This section will present these rules and their applicability with regard to e-commerce and discuss whether they can be useful protection measure against negative effects of DRM.

¹⁵⁶ For example, the court in *Hill v. GATEWAY 2000, Inc.* recognized that a vendor as a 'master of the offer' may provide a buyer with a certain period of time during which the buyer can inspect the item and the terms and if he does not agree, return the item. *Rich Hill and Enza Hill v GATEWAY 2000, INC, and David Prais* [1997] 105 F 3d 1147, 1150.

¹⁵⁷ Oakley (n 40) 1061, Braucher (n 15) 414.

¹⁵⁸ 15 USCA § 41–58.

¹⁵⁹ Robert A Hillman and Jeffrey J Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 New York University Law Review 429, 456–63, as cited by Oakley (n 40), 1062.

3.3.1 Doctrine of unconscionability

Under the doctrine of unconscionability a court may refuse to enforce a contract or its clause if the contract or the clause was unconscionable at the moment when it was made.¹⁶⁰ This rule is established by different legal provisions, out of which none actually defines unconscionability.¹⁶¹ Case law defines unconscionability as ‘the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them’.¹⁶² An unconscionable term or contract is assessed ‘in the light of the general commercial background and the commercial needs of the particular trade or case’.¹⁶³ The wording of the provision § 2-302 of the UCC suggests that the refusal of the enforcement is left to the court’s discretion.

The US legal theory and case law recognize procedural and substantive unconscionability.¹⁶⁴

The procedural unconscionability focuses on procedural or formal aspects of contracts, such as length and comprehensibility of a contract, enforceability of standard terms and contract

¹⁶⁰ UCC § 2-302 (2002), Restatement (Second) of Contracts § 208 (1981), ALI Principles § 1.11 (2010).

¹⁶¹ *ibid.*

¹⁶² *Fanning v Fritz’s Pontiac-Cadillac-Buick, Inc* [1996] 472 SE 2d 242, 245, as cited in Lucchi (n 2) 113.

¹⁶³ UCC § 2-302 (2002), comment 1. The American Law Institute and National Conference of Commissioners on Uniform State Laws, ‘Uniform Commercial Code. Official Comment’ (2014, electronic version)

<http://international.westlaw.com/result/default.wl?cfid=1&mt=LawSchoolPractitioner&origin=Search&sri=334&query=%22uniform+commercial+code+article+2-302%22&db=UCC-TEXT&rlt=CLID_QRYRLT1230952283273&method=WIN&service=Search&eq=Welcome%2fLawSchoolPractitioner&rp=%2fWelcome%2fLawSchoolPractitioner%2fdefault.wl&sp=intceu2-000&srch=TRUE&vr=2.0&action=Search&rltdb=CLID_DB984452283273&sv=Split&fmqv=s&fn=top&utid=25&rs=UKIS1.0> accessed 26 March 2015.

¹⁶⁴ James R Maxeiner, ‘Standard Terms Contracting in the Global Electronic Age: European Alternatives’ (2003) 28 Yale Journal of International Law 109, 118, as cited in Oakley (n 40) 1063; Korobkin (n 40) 1256. See also ALI Principles (2010) § 1.11, comment b. The American Law Institute, ‘ALI-Software § 1.11’ (2015, electronic version)

<<http://international.westlaw.com/result/previewcontroller.aspx?TF=756&TC=4&mt=LawSchoolPractitioner&db=203931&rs=WLIN15.01&findtype=Y&docname=ALISOFTWARES1.11&rp=%2fdefault.wl&spa=intceu2-000&ordoc=0389952630&tc=-1&vr=2.0&fn=top&sv=Split&tf=1&pbc=B814F785&utid=25&RP=/find/default.wl&bLinkViewer=true>> accessed 26 March 2015.

formation, while the substantive unconscionability focuses on the content of the terms.¹⁶⁵ Contracts of adhesion have been found procedurally unconscionable *per se* in the case *Comb v. Paypal, Inc.*¹⁶⁶ however, the Court at the same time held that even procedurally unconscionable terms may nonetheless be enforced ‘if the substantive terms are reasonable’.¹⁶⁷ On the other hand, lesser or even no procedural unconscionability will be required if a term is substantively onerous or outrageous.¹⁶⁸

3.3.2 *The Restatement (Second) of Contracts*

Contracting by use of standard terms is also reflected in the Restatement (Second) of Contracts. In general, under the Restatement a party can manifest assent to a standardized agreement in writing and shall be bound by it. However, if ‘the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement’.¹⁶⁹

The wording suggests that an emphasis should be put on the belief of the party not manifesting assent, ie the drafting party. However, available case law shows that courts have come to a different interpretation. They have focused on examination of the non-drafting party’s state of mind and his reasonable expectations about the terms contained in the standard form contract.¹⁷⁰ This interpretation developed by the courts makes this approach similar to the doctrine of reasonable expectations,¹⁷¹ which will be discussed below.

¹⁶⁵ *ibid.*

¹⁶⁶ *Comb v Paypal, Inc* [2002] 218 F Supp 2d 1165, 1172.

¹⁶⁷ *Comb v Paypal, Inc* [2002] 218 F Supp 2d 1165, 1173, referring to *Craig v Brown & Root, Inc* [2000] 84 Cal App 4th 416, 422–23.

¹⁶⁸ ALI Principles § 1.11 (2010), comment c. The American Law Institute (n 164).

¹⁶⁹ Restatement (Second) of Contracts § 211(3) (1981).

¹⁷⁰ James J White, ‘Form Contracts under Revised Article 2’ 75 Washington University Law Quarterly (1997) 315, 346–47, as cited by Hillman and Rachlinski (n 159) 459.

¹⁷¹ Hillman and Rachlinski (n 159) 459, as cited by Oakley (n 40) 1065.

Compared to the doctrine of unconscionability, the Restatement's approach is similar in focusing on the terms that are oppressive for the consumer.¹⁷² A difference between the two approaches is seen in their consequences; under the doctrine of unconscionability a court can discretionary refuse to enforce the term in question if it is found unconscionable, while the Restatement's approach results in invalidity of the term.

3.3.3 *Doctrine of reasonable expectations*

The doctrine of reasonable expectations is defined as 'the principle that an ambiguous or inconspicuous term in a contract should be interpreted to favor the weaker party's objectively reasonable expectations from the contract, even though the explicit language of the terms may not support those expectations'.¹⁷³ This doctrine allows honoring reasonable expectations of the consumers even if they are different from the wording of the contract.¹⁷⁴ At the same time the doctrine confirms that despite failure to read the contracts, the consumers will be bound by their terms if they could be reasonably expected.¹⁷⁵

One problematic aspect of the doctrine of reasonable expectations is that it has been widely used only in a specific field of law.¹⁷⁶ Another, and even more important, problematic aspect is that reasonable consumer expectations are difficult to define. They may depend on many factors, and there is not yet a common standard or agreement about what they should include. With regard to the digital content, it is often argued that the reasonable expectations of consumers are comparable to those they have towards the same content in analog format.¹⁷⁷ However, opinions of experts can diverge significantly. For example, according to Braucher,

¹⁷² Hillman and Rachlinski (n 159) 458.

¹⁷³ Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, West 2009).

¹⁷⁴ Hillman and Rachlinski (n 159) 459.

¹⁷⁵ *ibid*, 460.

¹⁷⁶ The doctrine is mostly used in insurance cases; Oakley (n 40) 1065.

¹⁷⁷ Elkin-Koren (n 62) 1130.

consumers should not reasonably expect that digital content will be free from user restrictions such as DRM. Furthermore, although in his opinion consumers may reasonably expect compatibility of different types of digital content (movies, music, games, and software downloaded or supplied on a tangible medium) with interacting hardware or software, he makes exceptions in some cases of freely acquired material.¹⁷⁸ On the other hand, Sohn would see reasonable expectations more broadly, including a flexible use of digital content in a manner or sequence of one's choice, a use of a work flexible in time and place (ability to use it at a later time or on a different device), an ability to archive a copy of the material, or limited non-commercial copying.¹⁷⁹ These two scholars show the existing diversity of views regarding the reasonable expectations of consumers which lack a unified standard.

3.3.4 *The Federal Trade Commission Act*

The Federal Trade Commission Act provides that a trade practice is unfair if it 'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.'¹⁸⁰

The substantial injury to a consumer can result from positive actions but also from omission of a positive action, typically omission to provide information.¹⁸¹

Deceptive practices are according to the FTC those, where material terms have not been disclosed to a consumer in a clear and conspicuous manner, while a reasonable consumer standard is applied.¹⁸² For example in a case of supply of software, a notice should be

¹⁷⁸ Braucher (n 15) 428–31.

¹⁷⁹ David Sohn, 'Understanding DRM' (2007) 5 Queue 32, 35.

¹⁸⁰ 15 USCA § 45(4) (2006).

¹⁸¹ Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate 2005) 164.

¹⁸² August Horvath, John Villafranco and Stephen Calkins, *Consumer Protection Law Developments* (ABA Section of Antitrust Law 2009) 178.

unavoidable and it should be made before installing or downloading the software.¹⁸³ The information should be disclosed in an understandable language.¹⁸⁴ The information can be provided on a website, but in such a way that graphics, visual representation or other information contained on the website does not distract the consumer.¹⁸⁵

Examples of practices concerning software that have been found deceptive and unfair are: a failure to inform that software tracked online activity of consumers,¹⁸⁶ bundling software without notifying consumers,¹⁸⁷ installing software without a consumer's consent,¹⁸⁸ modifications made to the consumer's system without his knowledge and authorization,¹⁸⁹ exploiting security vulnerabilities in the consumer's computer in order to download or install any software or program,¹⁹⁰ collecting personally identifiable information about consumers without their consent,¹⁹¹ absence of reasonable option to uninstall the

¹⁸³ *Advertising.com*, No 042-3196, Decision and Order (FTC 2005) 2–3 <<https://www.ftc.gov/sites/default/files/documents/cases/2005/09/050916do0423196.pdf>> accessed 17 March 2015.

¹⁸⁴ *ibid*.

¹⁸⁵ The Federal Trade Commission, 'Dot Com Disclosures: Information about Online Advertising' (2000) 9 <<https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf>> accessed 17 March 2015; as cited by Horvath, Villafranco and Calkins (n 182) 179.

¹⁸⁶ *FTC v Enternet Media*, No CV05-7777CAS AJWx, First Amended Complaint (CD Cal 2005) 14 <<https://www.ftc.gov/sites/default/files/documents/cases/2005/11/051110amndcomp0523135.pdf>> accessed 17 March 2015; as cited by Horvath, Villafranco and Calkins (n 182) 180.

¹⁸⁷ *ibid*, 6; *Advertising.com*, No 042-3196, Decision and Order (FTC 2005) 2–3 <<https://www.ftc.gov/sites/default/files/documents/cases/2005/09/050916do0423196.pdf>> accessed 17 March 2015; as cited by Horvath, Villafranco and Calkins (n 182) 186–87.

¹⁸⁸ *FTC v Seismic Entertainment Productions, Inc., et al.*, No 04-377-JD, Complaint (CD New Hampshire 2006) 6–10. <<https://www.ftc.gov/sites/default/files/documents/cases/2004/10/041012comp0423142.pdf>> accessed 17 March 2015; *Zango, Inc f/k/a 180 Solutions, Inc*, No 052-3130, Decision and Order (FTC 2007) <<https://www.ftc.gov/sites/default/files/documents/cases/2007/03/0523130c4186decisionorder.pdf>> accessed 17 March 2015; as cited by Horvath, Villafranco and Calkins (n 182) 182.

¹⁸⁹ *ibid*.

¹⁹⁰ *FTC v Odysseus Marketing, Inc and Walter Rines*, No 05-CV-330-SM, Stipulated Final Order (CD New Hampshire 2006) 18 <<https://www.ftc.gov/sites/default/files/documents/cases/2006/11/061121odysseusstipfinal.pdf>> accessed 17 March 2015; as cited by Horvath, Villafranco and Calkins (n 182) 184.

¹⁹¹ *ibid*, 10.

software,¹⁹² downloading of software, which automatically reinstalled itself after it had been removed, without consumers' consent.¹⁹³

3.3.5 Assessment

Examination of unfairness is a cascade process. Courts will usually not proceed to detection of substantive unconscionability unless they find a procedural defect in the first place.¹⁹⁴ For a consumer that finds himself dissatisfied with digital content he bought due to DRM it means that the court will first look at the contracting process. Even if the contract was a standard form agreement, which will be the case most of the time, the court will have to examine the presence of substantive unconscionability, in the form of oppressive and one-sided terms. Due to this two-step process this doctrine creates rather a high threshold of consumer protection.

Under the FTC a substantial injury has to be caused or likely to be caused in order to establish unfairness. With regard to digital content, examples of unfair practices in the subsection 3.3.4 of this thesis suggest that in many cases the unfairness will be a result of an absence of notification or information provided to the consumer. It can be assumed that most of those and similar terms and practices would not have been found unfair had the consumer been informed in a clear manner. Availability of information is thus an important aspect of fairness in consumer transactions.

The availability of information also has an impact on the level of consumers' reasonable expectations. Although no standard or agreement regarding reasonable expectations of consumers towards digital content and DRM has been reached yet, it can be argued that if the

¹⁹² *ibid*, 12.

¹⁹³ *FTC v Digital Enterprises, Inc, d/b/a Movieland.com, et al*, No CV06-4923 CAS (AJWx) Stipulated Final Order (CD Cal 2007) 6ff <<https://www.ftc.gov/sites/default/files/documents/cases/2007/09/070905digitalenterprisesstipfnl.pdf>> accessed 17 March 2015.

¹⁹⁴ Korobkin (n 40) 1254.

consumer has been informed about the presence of DRM in digital content and its effects, he can no longer claim this to be a reasonably unexpected fact. A seller should thus make an effort to anticipate what reasonable expectations about the digital content's quality and functioning the consumers might have and point out any terms that could presumably differ from those expectations.¹⁹⁵

3.4 Concluding notes on the US legal framework

On the basis of the aforementioned it can be concluded that US law does not provide measures that would be specifically designed for the protection of consumers in e-commerce transactions involving digital content and DRM. General doctrines and principles of unfairness, unconscionability and reasonable expectations can be applied in those cases, and they are mentioned by some scholars as possible measures against DRM and their negative effects.¹⁹⁶ However, it has been shown that they either create a high standard of consumer protection¹⁹⁷ or their application to digital content and DRM is uncertain due to absence of a definite standard of reasonable expectations.¹⁹⁸ Thus they do not provide for a detailed instruction how to deal with DRM and their negative effects.

¹⁹⁵ Hillman and Rachlinski (n 159) 460.

¹⁹⁶ For example Lucchi expressed the view that despite their problematic aspects, the outlined consumer protection doctrines under the UCC and the common law (including unconscionability and reasonable expectations) can be used to address unfair terms and provide basis for avoiding 'some unclear and surreptitiously undiscovered terms connected with the use of a technological protection measure.' Lucchi (n 2) 114–16. Nevertheless, without being evidenced by settled case law this conclusion is rather hypothetical.

¹⁹⁷ The doctrine of unconscionability provides a high threshold for a refusal to enforce the terms, because usually both procedural and substantive unconscionability must be present. 'Attention to both procedure and substance also makes the law expensive to invoke.' Braucher (n 15) 400. Rustad and Onufrio argue that the doctrine 'is often asserted, but seldom successfully deployed to strike down one-sided clauses.' Michael D Scott, *Scott on Information Technology Law* (3rd edn, Volume II, Aspen Publishers 2014) 7–42 as cited by Michael L Rustad and Maria Vittoria Onufrio, 'Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy' (2012) 14 University of Pennsylvania Journal of Business Law 1085, 1150.

¹⁹⁸ 'Unconscionability is an unwieldy and uncertain standard, and the doctrine of reasonable expectations and the Restatement are largely used in other kinds of cases.' Oakley (n 40) 1065.

CHAPTER 4 – Comparison

The purpose of this chapter is to make a comparison of the main characteristics of the US and the EU legal approaches that were outlined in the previous chapters of this thesis. The comparison will be structured in three parts, with each one referring to one of the outlined measures of consumer protection, ie the information obligation, the right of withdrawal (or the right to cancel the contract) and the unfair terms and practices. The comparative analysis will be functional, ie it will look not at rules themselves but mainly at their legal effects and consequences for consumers.

4.1 Information obligation

The analysis of the EU legal framework showed that consumer protection in general is based on the information paradigm.¹⁹⁹ This means that quite an extensive information obligation imposed on traders is an essential characteristic of this legal approach. EU law contains several Directives aimed at consumer protection, while information obligation is regulated in a few different sources and in a number of provisions. EU law provides a list of information that has to be disclosed to the consumer prior to entering to a contract. On this point the EU approach is more consumer-biased than the US approach, where no such express obligation or at least an indicative list could be found.

An EU consumer is, at least according to the explicit rules, entitled to obtain much more information than a US consumer. Opinions differ on whether this also means that the EU consumer is better protected than the US one. Easily accessible information certainly helps the consumer to better evaluate all the important aspects of the transaction, compare different

¹⁹⁹ According to the CJEU under consumer protection law ‘the provision of information to the consumers is considered to be one of the principal requirements.’ Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois* [1990] ECR I-00667, para 18.

options and decide whether to enter into the contract or not. This is the basic idea behind the information paradigm. Nevertheless, this approach is criticized by some authors and one of the main criticism points to the fact that consumers are provided so much information that they can feel information overflow.²⁰⁰ This can in the end of the day create a completely opposite effect on consumers, who instead of reasonably considering pertinent information and focusing on the important aspects of the transactions, may give up on getting acquainted with disclosed information at all. An empirical study shows that actually only a very low number of e-consumers read the standard forms.²⁰¹ Despite this and other criticized points, the information paradigm has been the basis of the EU consumer law.²⁰²

In contrast, US law does not provide for explicit mandatory disclosure. However, the obligation to provide information is implied from the doctrine of unconscionability and reasonable expectations. A seller should, in order to avoid that the terms will be declared unenforceable or void, point out to the consumer at least those terms that could be surprising or reasonably unexpected. Moreover, practice of the FTC shows that information disclosure has to also meet a certain formal standard. This practice, similarly to the EU rules, aims to avoid any misleading or deceptive practices in the contractual process.

It follows that the EU approach to the information disclosure is more regulatory and resulting in explicit provisions obliging the traders to inform the consumers about the presence of DRM prior to conclusion of the contract. A failure to do so would in many cases constitute an unfair commercial practice (misleading information or omission).²⁰³ Although in the US the

²⁰⁰ Reich (n 104) 8–9.

²⁰¹ Robert A Hillman, ‘On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications’ (Cornell Law Faculty Publications, Paper 29, 2005) 7.

²⁰² Another important reproach is based on an argument that mandatory disclosure instead of raising the awareness of the consumer may lead to validity and enforceability of the terms despite of a fact that consumer has not read them. Robert A Hillman, ‘Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?’ (2006) 104 Michigan Law Review 837, 839.

²⁰³ See the subsections 2.3.1, 2.4.1 and 2.5.1 of the thesis.

disclosure rules are not explicit, failure to provide certain information about functioning of digital content, especially information that the consumer does not reasonably expect, could also constitute unfairness.²⁰⁴ At this point, at least, these two approaches are functionally converging.

4.2 The right of withdrawal (the right to cancel a contract)

The right of withdrawal, or the right to cancel a contract, entitles a consumer to unilaterally rescind the contract without giving any reasons. The right of withdrawal has two purposes: firstly, it provides a cooling-off period and secondly it remedies information asymmetry.²⁰⁵

In the first case, the consumer can decide to rescind the contract even if it satisfies his needs. Perhaps he has made a hasty decision that he now wants to reverse it for any reason or without a reason. In this case, EU law is more consumer protective, because it provides a minimum 14 days cooling-off period. In contrast, there is no such general cooling-off period provided for at the federal level in the US.

With regard to information asymmetry, the period within which the consumer is entitled to exercise the right of withdrawal, or the right to cancel the contract, should allow him to assess the information he has already received or to find out more information about the subject matter of the contract.²⁰⁶ Although the EU approach provides for general right of withdrawal, in most cases concerning digital content either the right would not exist or would be lost after a prior consent and acknowledgment of the consumer.²⁰⁷ Most digital content is supplied without any tangible medium, and the performance of the contract (downloading of the content) starts

²⁰⁴ See the subsection 3.3.4 of the thesis.

²⁰⁵ Hans W Micklitz, Jules Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (Hart 2010) 240.

²⁰⁶ *ibid.*

²⁰⁷ See the section 2.3 of the thesis.

shortly after the conclusion of the contract. In such situations, as it was explained earlier, the consumer would be asked to provide a consent with the start of the performance during the withdrawal period and an acknowledgment that as a consequence he will lose the right to withdraw. In these situations, the prior information disclosure remains the main measure of consumer protection. The mandatory information about presence of DRM should give the consumer the opportunity to make an informed decision about entering into such a contract that he would not be able to cancel.

In contrast, in the US, consumers generally do not have a right to cancel the contract unilaterally due to the presence of DRM. If a consumer is dissatisfied with the digital content due to the presence of DRM he can claim non-conformity with the contract and return the item according to the UCC in a very short period of time, however this constitutes rather a weak measure of consumer protection.

It follows that with regard to contracts for supply of digital content with DRM, the US and the EU legal provisions lead to quite similar effects. Firstly, usually the right of withdrawal (the right to cancel a contract) would not be available; either because the legal system does not provide for it in general (the US) or although it is generally available, it does not exist in most cases of provision of digital content without any tangible medium (the EU). Secondly, if the consumer cannot withdraw from the contract (or cancel the contract), he can claim unfairness of the terms or of the practice in question. A comparison of the two approaches toward unfairness will be closely analyzed in the following section.

4.3 Unfair terms and practices

Despite quite different doctrinal and legislative approach to regulation of unfair terms and practices, some functional similarities can be found between the EU and the US legal frameworks.

Both approaches apply cascade assessment of unfairness, where usually firstly procedural and then substantive unfairness is examined. In US law this is quite clear and recognized by both case law and scholars.²⁰⁸ In the EU, the procedural unfairness is above all dealt with when assessing non-negotiated contract terms.²⁰⁹ When assessing the procedural unfairness, the court will ask whether any procedural defect is present either in the process of the contract negotiation or formation, or in the contract itself (for example in the language or the length of the contract).

Based on the analysis of the two systems that was outlined in this thesis, it can be stated that the threshold of procedural unfairness in the EU is lower than in the US, ie in EU law the procedural unfairness can be theoretically found in more cases than in the US, because of the strict and detailed formal rules that EU law contains. For example, the procedural unfairness can be present if any mandatory pre-contractual information is omitted. In contrast, the US threshold of the procedural unfairness is higher, because as it was mentioned, the US approach is not as regulatory as the EU approach when it comes to formal requirements. Regarding non-negotiated terms, both EU law²¹⁰ and US law²¹¹ see them as presumptively procedurally unfair, provided that the substantive unfairness is also present. At the same time, both EU and US law will in principle enforce non-negotiated terms against a consumer, unless any substantive unfairness is found.

Similarities between the EU and the US approach can be observed also concerning the substantive unfairness. Although EU law does not use the term ‘substantive unfairness’, it could be actually found in the indicative list of unfair contract terms and in the definition of an unfair

²⁰⁸ See the subsection 3.3.1 of the thesis.

²⁰⁹ See the section 2.4 of the thesis. Under Article 3(1) of the Directive on Unfair Terms in Consumer Contracts ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.’

²¹⁰ Directive on Unfair Terms in Consumer Contracts, art 3(1).

²¹¹ *Comb v Paypal, Inc* [2002] 218 F Supp 2d 1165, 1173, referring to *Craig v Brown & Root, Inc* [2000] 84 Cal App 4th 416, 422–23.

contract term, which ‘contrary to the requirement of good faith, (...) causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’.²¹² In the US, similar and rather vague concept of substantive unconscionability is applied; as it was explained, the term must be oppressive or one-sided.

It can be concluded that in theory, under EU and US laws, the unfairness of consumer electronic transactions will be assessed similarly. According to some opinions, even the indicative grey list of unfair terms contained in the annex of the Directive on Unfair Terms in Consumer Contracts can be taken into consideration by the US courts when evaluating unconscionability claims.²¹³ When it comes to the assessment of unfairness in specific situations involving digital content and DRM, some similarities can be found in the case law of the EU member states’ courts²¹⁴ and in the practice of the FTC together with related case law of US courts.²¹⁵ Nevertheless, the available relevant case law so far is not extensive enough to make any general conclusions.

One more remark could be made concerning the accessibility of this measure to the consumer, although the detailed analysis was not the aim of this thesis. EU consumers are provided with quite high judicial protection, because besides the protective rules they do not even have to specifically ask the court to assess the unfairness.²¹⁶ By contrast, in the US, consumers can use the doctrine of unconscionability only as a defense, while it is generally difficult to succeed with it.²¹⁷ In this regard the EU consumer protection system appears to be in principle more effective than the US one.

²¹² Directive on Unfair Terms in Consumer Contracts, art 3(1).

²¹³ ALI Principles (2010) § 1.11, comment c. The American Law Institute (n 164).

²¹⁴ See the subsections 2.4.1 and 2.5.1 of the thesis.

²¹⁵ See the subsection 3.3.4 of the thesis.

²¹⁶ Case C-243/08 *Pannon GSM Zrt v Sustikné Györfi Erzsébet* [2009] ECR I-4713.

²¹⁷ Frederick H Miller and John D Lackey, *The ABCs of the UCC: Related and Supplementary Consumer Law* (2nd edn, American Bar Association 2004) 109 as cited by Lucchi (n 2) 113.

Conclusion

The main research question of this thesis asked whether the rules providing for consumer protection are an effective measure to reduce some of the negative effects of the DRM technologies. The comparative analysis of the relevant rules in EU and US law revealed several findings.

The analysis showed that although, with some exceptions, the relevant rules in EU and US law were not designed for this sole purpose, they can be generally applied to e-commerce consumer transactions involving digital content. Their efficiency with regards to the negative effects of DRM, however, is reduced by their vagueness and high threshold they create.

Furthermore, the comparative analysis found that the relevant rules in EU and US law are very different, yet their effects can converge to a certain extent. A significant importance in consumer e-commerce transactions involving digital content and DRM belongs to the pre-contractual disclosure. This is the case, quite surprisingly, in both EU and US law, although the US approach is very different from the EU approach. EU law is more regulatory than US law and it provides for an explicit pre-contractual information obligation in general and also specifically with regard to consumer e-commerce transactions involving digital content and DRM. In US law no such regulatory approach can be found. The questions that EU law deals with explicitly are in US law mostly implied. Nevertheless, both in the EU and the US the pre-contractual information remains essential.

Despite the general regulatory approach, when it comes to provisions on unfairness, EU law does not address questions of digital content or DRM in a specific way. Rather, it applies general rules on unfair terms and unfair practices that were not specifically designed for transactions involving digital content and whose interpretation is therefore at some points questionable or uncertain. US law also applies general principles of unfairness,

unconscionability and reasonable expectations that are on the one hand flexible, but on the other create quite an uncertainty in application.²¹⁸

It follows that some questions regarding interpretation and application of consumer protection rules to digital content and DRM remain to be clarified. Although certain guidance can already be found in the courts' decisions and the FTC's practice, in order to create a stable standard of legal protection, a crucial role will be played by the case law of the CJEU, the member states' courts and the US courts. This thesis can thus provide a basis for further research of the topic in the light of the future case law developments.

²¹⁸ Braucher (n 15) 400.

Bibliography

Adler DB and others, 'United States' in Cordell N (ed), *Intellectual Property and the Internet: a Global Guide to Protecting Intellectual Property Online* (Globe Law and Business 2014)

Bechtold S, 'Digital Rights Management in the United States and Europe' (2004) 52 *The American Journal of Comparative Law* 323

Bohannon C, 'Copyright Preemption of Contracts' (2008) 67 *Maryland Law Review* 616

Braucher J, 'United States' in University of Amsterdam (ed), 'Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services' (Report 1: Country Reports, 2011) <http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015

Cavoukian A, 'Privacy and Digital Rights Management (DRM): An Oxymoron?' (Information and Privacy Commissioner, Ontario, 2002) <<https://www.ipc.on.ca/images/Resources/up-1drm.pdf>> accessed 8 February 2015

Clark CE 'The Restatement of the Law of Contracts' (1933) XLII *Yale Law Journal* 643

Coteanu C, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate 2005)

Dickie J, *Producers and Consumers in EU e-Commerce Law* (Hart Publishing, 2005)

Elkin-Koren N, 'Making Room for Consumers under the DMCA' (2007) 22 *Berkeley Technology Law Journal* 1119

European Commission, 'Commission Staff Working Document: Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (SEC (2009) 1666, 3 December 2009) <http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf> accessed 8 February 2015

European Commission – DG Justice, 'DG Justice Guidance Document Concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council' (June 2014) <http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf> accessed 8 February 2015

Europe Economics, 'Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (Lot 1)' (Report 4: Final Report, 15 June 2011) <http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf> accessed 8 February 2015

Garner BA (ed), *Black's Law Dictionary* (9th edn, West 2009)

Grasser U and Girsberger M, 'Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States. A Genie Stuck in the Bottle?' (The Berkman Center for Internet & Society at Harvard Law School, Berkman Publication Series no. 2004-10, 2004)

Grodzinsky FS and Bottis MC, 'Private Use as Fair Use: Is It Fair?' (2007) 37 SIGCAS Computers and Society 11

Guibault L, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002)

Guibault L, 'Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment.' (2008) 31 Journal of Consumer Policy 409

Helberger N, 'Standardizing Consumers' Expectations in Digital Content' (2011) 13 info 69, 74

Helberger N and Hugenholtz PB, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law' (2007) 22 Berkeley Technology Law Journal 1061

Helberger N and others, 'Digital Content Contracts for Consumers' (2013) 36 Journal of Consumer Policy 37

Hillman RA, 'On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications' (Cornell Law Faculty Publications, Paper 29, 2005)

Hillman RA, 'Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?' (2006) 104 Michigan Law Review 837

Hillman RA and O'Rourke MA 'Principles of the Law of Software Contracts: Some Highlights' (2010) 84 Tulane Law Review 1519

Hillman RA and Rachlinski JJ, 'Standard-Form Contracting in the Electronic Age' (2002) 77 New York University Law Review 429

Hoffer A, 'A Matter of Access: How Bypassing DRM Does Not Always Violate the DMCA' (2011) 7 Washington Journal of Law, Technology & Arts 13

Holm P, 'Piracy on the Simulated Seas: the Computer Games Industry's Non-Legal Approaches to Fighting Illegal Downloads of Games' (2004) 23 Information & Communications Technology Law 61

Horvath A, Villafranco A and Calkins S, *Consumer Protection Law Developments* (ABA Section of Antitrust Law 2009)

Korobkin R, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' 70 (2003) University of Chicago Law Review 1203

Jacquemin H, 'Digital Content and Consumer Protection within European Law' in Arnab Alapan and Colin Jean-Noel (eds), *The 8th International Workshop for technical, Economic and Legal Aspects of Business Models for Virtual Goods* (Presses universitaires de Namur 2010)

- Laine J, 'Finland' in University of Amsterdam (ed), 'Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services' (Report 1: Country Reports, 2011) <http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015
- Lapiente SC and Gómez RY, 'Spain' in University of Amsterdam (ed), 'Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services' (Report 1: Country Reports, 2011) 331 <http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015
- Loos MBM and others, 'Final Report: Comparative Analysis, Law & Economics Analysis, Assessment and Development of Recommendations for Possible Future Rules on Digital Content Contracts' (University of Amsterdam 2011) <http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf> accessed 8 February 2015
- Lucchi N, 'Intellectual Property Rights in Digital Media: A Comparative Analysis of Legal Protection Technological Measures, and New Business Models under EU and U.S. Law' (2005) 53 Buffalo Law Review 1111
- Lucchi N, 'Countering the Unfair Play of DRM Technologies' (2007) 16 Texas Intellectual Property Law Journal 91
- MacQueen H, 'Copyright and the Internet' in Edwards L and Waelde C (eds), *Law and the Internet* (Hart Publishing, 2000)
- Maxeiner JR, 'Standard Terms Contracting in the Global Electronic Age: European Alternatives' (2003) 28 Yale Journal of International Law 109
- Micklitz HW, Stuyck J and Terryn E, *Cases, Materials and Text on Consumer Law* (Hart 2010)
- Miller FH and Lackey JD, *The ABCs of the UCC: Related and Supplementary Consumer Law* (2nd edn, American Bar Association 2004)
- Moffat VR, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41 University of California, Davis 45
- Oakley RL, 'Fairness in Electronic Contracting: Minimum Standards for Non-negotiated Contracts' (2005) 42 Houston Law Review 1041
- O'Rourke M, 'Preemption after the ProCD Case: A Market-Based Approach' (1997) 12 Berkeley Technology Law Journal 53
- Reich N, 'Crisis or Future of European Consumer Law?' in Parry C and Nordhausen A (eds), *The Yearbook of Consumer Law 2009* (Ashgate 2009)

Reichman JH and Franklin JA, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information' (1999) 147 University of Pennsylvania Law Review 875

Robinson DB, 'Digital Rights Management Lite: Freeing Ebooks from Reader Devices and Software. Can Digital Visible Watermarks in ebooks Qualify for Anti-circumvention Protection under the Digital Millenium Copyright Act?' (2013) 17 Virginia Journal of Law & Technology 152

Rustad ML, *Internet Law in a Nutshell* (West 2009)

Rustad ML, Onufrio MV, 'Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy' (2012) 14 University of Pennsylvania Journal of Business Law 1085

Samuelson P, 'Digital Rights Management {and, or, vs.} the Law' (2003) 46 Communications of the ACM 41

Savin A, *EU Internet Law* (Edward Elgar 2013)

Scott MD, *Scott on Information Technology Law* (3rd edn, Volume II, Aspen Publishers 2014)

Sohn D, 'Understanding DRM' (2007) 5 Queue 32

Szwak DA, 'Uniform Computer Information Transaction Act [U.C.I.T.A.]: The Consumer's Perspective' (2002) 63 Louisiana Law Review 27

The American Law Institute, 'ALI-Software § 1.11' (2015, electronic version) <<http://international.westlaw.com/result/previewcontroller.aspx?TF=756&TC=4&mt=LawSchoolPractitioner&db=203931&rs=WLIN15.01&findtype=Y&docname=ALISOFTWARES1.11&rp=%2ffind%2fdefault.wl&spa=intceu2-000&ordoc=0389952630&tc=-1&vr=2.0&fn=top&sv=Split&tf=-1&pbc=B814F785&utid=25&RP=/find/default.wl&bLinkViewer=true>> accessed 26 March 2015

The American Law Institute and National Conference of Commissioners on Uniform State Laws, 'Uniform Commercial Code. Official Comment' (2014, electronic version) <http://international.westlaw.com/result/default.wl?cfid=1&mt=LawSchoolPractitioner&origin=Search&sri=334&query=%22uniform+commercial+code+article+2-302%22&db=UCC-TEXT&rlt=CLID_QRYRLT1230952283273&method=WIN&service=Search&eq=Welcome%2fLawSchoolPractitioner&rp=%2fWelcome%2fLawSchoolPractitioner%2fdefault.wl&sp=intceu2-000&srch=TRUE&vr=2.0&action=Search&rltdb=CLID_DB984452283273&sv=Split&fmqv=s&fn=top&utid=25&rs=UKIS1.0> accessed 26 March 2015

The Federal Trade Commission, 'About the FTC' <<http://www.ftc.gov/about-ftc>> accessed 3 March 2015

The Federal Trade Commission, 'Dot Com Disclosures: Information about Online Advertising' (2000) <<https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf>> accessed 17 March 2015

The Federal Trade Commission, 'Rules' <<http://www.ftc.gov/enforcement/rules>> accessed 3 March 2015

'Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations' (2015) 80 Federal Register 1329

<http://www.ftc.gov/system/files/documents/federal_register_notices/2015/01/150109cooling_offfrn.pdf> accessed 4 March 2015

'Uniform Computer Information Transactions Act Refs & Annos' (Thomson Reuters 2014, electronic version)

<http://international.westlaw.com/result/default.wl?cfid=1&mt=LawSchoolPractitioner&origin=Search&sri=329%2c330%2c333%2c334&query=%22UNIFORM+COMPUTER+INFORMATION+TRANSACTIONS+ACT%22+%26+%22GRAVAMEN+OF+THE+ACTION+STANDARD%22&db=REST%2cUS-RULES%2cULA%2cUCC-TEXT&rlt=CLID_QRYRLT88241217253&method=TNC&service=Search&eq=Welcome%2fLawSchoolPractitioner&rp=%2fWelcome%2fLawSchoolPractitioner%2fdefault.wl&sp=intceu2-000&srch=TRUE&vr=2.0&action=Search&rltdb=CLID_DB686491117253&sv=Split&fmqv=s&fn=top&utid=25&rs=UKIS1.0> accessed 25 March 2015

Välimäki M and Oksanen V, 'DRM Interoperability and Intellectual Property Policy in Europe.' (2006) <http://www.valimaki.com/org/drm_interoperability_final.pdf> accessed 8 February 2015

White JJ, 'Form Contracts Under Revised Article 2' (1997) 75 Washington University Law Quarterly 315

Wilhelmsson T, 'Misleading practices' in Howells GG, Micklitz HW and Wilhelmsson T (eds), *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006)

Willett C and Morgan-Taylor M, 'United Kingdom' in University of Amsterdam (ed), 'Digital Content Services for Consumers: Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services' (Report 1: Country Reports, 2011) <http://www.academia.edu/1477651/Digital_content_services_for_consumers_Comparative_analysis_of_the_applicable_legal_frameworks_and_suggestions_for_the_contours_of_a_model_system_of_consumer_protection_in_relation_to_digital_content_services> accessed 8 February 2015

Table of Cases

Advertising.com, No 042-3196, Decision and Order (FTC 2005),.....	43
Bundesgerichtshof, Urteil vom 12.10.2005 - IV ZR 162/03,.....	28
Comb v Paypal, Inc [2002] 218 F Supp 2d 1165,.....	40, 50
Content Services Ltd v Bundesarbeitskammer (C-49/11) [2012] OJ C 287/8,.....	21
Craig v Brown & Root, Inc [2000] 84 Cal App 4th 416,.....	40, 50
Fanning v Fritz's Pontiac-Cadillac-Buick, Inc,.....	39
FTC v Digital Enterprises, Inc, d/b/a Movieland.com, et al, No CV06-4923 CAS (AJWx) Stipulated Final Order (CD Cal 2007),.....	44
FTC v Enternet Media, No CV05-7777CAS AJWx, First Amended Complaint (CD Cal 2005),	43
FTC v Odysseus Marketing, Inc and Walter Rines, No 05-CV-330-SM, Stipulated Final Order (CD New Hampshire 2006),.....	43
FTC v Seismic Entertainment Productions, Inc, et al, No 04-377-JD, Complaint (CD New Hampshire 2006),	43
GB-INNO-BM v. Confédération du Commerce Luxembourgeois (C-362/88) [1990] ECR I-00667,	46
Micro Data Base Systems, Inc v Dharma Systems, Inc [1998] 148 F3d 649,.....	8
Nintendo Co Ltd and Others v PC Box Srl, 9Net Srl (C-355/12) [2014] OJ C 93/8,.....	14
Pannon GSM Zrt v Sustikné Györfi Erzsébet (C-243/08) [2009] ECR I-4713,.....	28, 51
Pia Messner v Firma Stefan Krüger (C-489/07) [2009] OJ C 256/4,	25
Rich Hill and Enza Hill v GATEWAY 2000, INC, and David Prais [1997] 105 F3d 1147, ..	38
Sony Corp of America v Universal City Studios, Inc [1984] 464 US 417,.....	16
Zango, Inc f/k/a 180 Solutions, Inc, No 052-3130, Decision and Order (FTC 2007),	43
Williams v America Online, Inc [2001] Not Reported in NE 2d, 2001 WL 135824,	12

Table of Legislation

American Law Institute Principles of the Law of Software Contracts (2010),.....	7, 9, 10, 36, 39, 40, 51
California Business and Professions Code (2014),	37
Code of Federal Regulations,	36, 37
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 095/29,.....	20, 27, 29, 33, 50, 51
Digital Millennium Copyright Act (1998),	16

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1,.....	19, 21
Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2007] OJ L 167/10,.....	13, 14
Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22,	19, 20, 30, 31, 32, 33
Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64,.....	2, 6, 7, 18, 19, 20, 21, 22, 23, 24, 25, 31, 32, 33, 34
Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144/19,.....	23, 24
Federal Trade Commission Act,.....	38, 42
Restatement (Second) of Contracts (1981),	36, 38, 39, 40, 41
Uniform Commercial Code, Article 2 (2002),	7, 8, 36, 37, 38, 39, 45, 49
Uniform Computer Information Transactions Act (2000),	7, 8, 9, 35, 36, 37, 38
United States Code Annotated, Title 15 (1914),	38, 42
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